Supreme Court, U. S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1978

## No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, et al.,
*Defendant-Appellants,*

AND

ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
*Intervenor-Appellants,*

VS.

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the District of Arizona**

## BRIEF FOR THE APPELLEES

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ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the District of Arizona**

## BRIEF FOR THE APPELLEES

### OPINION BELOW

The opinion of the district court (A. 457-501) is reported at 449 F.Supp. 449.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution provide in pertinent part:

FIRST AMENDMENT: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

FOURTEENTH AMENDMENT: ". . . [Nor] shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

THE ARIZONA AGRICULTURAL EMPLOYMENT RELATIONS ACT (AERA); Arizona Revised Statutes (A.R.S.), Title 23, Ch. 8, Section 23-1381 *et seq.*, the text of which is set forth in the Appendix at 504 *et seq.*

Rule 65, Arizona Rules of Civil Procedure, incorporated in the AERA (§§ 23-1393(A) & (B)), the text of which is set forth as Appendix "A" to this brief.

Section 23-1301(1), Arizona Revised Statute (1971), incorporated in the AERA (§ 23-1382(7)), the text of which is set forth as Appendix "B" to this brief.

The Arizona Secondary Boycott law, A.R.S. Section 23-1321, incorporated in the AERA (Section 23-1385(B)(6)), the text of which is set forth as Appendix "C" to this brief.

## QUESTIONS PRESENTED

1. Is an Article III Case or Controversy presented by a challenge to a statute when:

(1) that statute has been steadily enforced against the plaintiffs over a five year period resulting in concrete, identifiable injuries;



(2) the statute imposes criminal penalties for the exercise of the very activities the plaintiffs had undertaken in the past and desire to continue to undertake;

(3) the statute is facially overbroad throughout, proscribing numerous forms of protected First Amendment speech activity?

2. In an action alleging facial invalidity of a statute for violating First Amendment rights of speech and association should a federal court abstain when (1) the meaning and operation of the statute is certain on its face, (2) it does not—without an actual rewriting—lend itself to interpretation by state courts which would avoid the constitutional issues, and (3) there is no likelihood of an expeditious state court proceeding that would resolve the constitutional questions raised?

3. Three separate provisions of the AERA provide for the issuance of *ex parte* temporary restraining orders without notice against the appellees' speech activities; one of those mandates an automatic restraining order without notice or hearing against union boycotts and strikes or threat thereof, merely upon proper application by an employer. May the State constitutionally sanction the issuance of *ex parte* restraining orders without notice or opportunity for hearing in the area of basic freedoms guaranteed by the First Amendment?

4. Section 1385(B)(8) of the AERA makes unlawful "dishonest, untruthful and deceptive publicity" as well as communications relating to workers' industry-wide concerns. Does a statute which provides for prior restraints on such communications and imposition of criminal penalties upon a labor organization and its members who under-

take them, prevent the uninhibited and robust public debate protected by the First Amendment?

5. Can a State constitutionally forbid communications between all representatives of labor organizations and members of the public on important issues related to labor disputes?

6. Do the provisions of Section 1385(B)(12) which outlaw all recognitional and organizational picketing and boycott activity, including informational picketing, merely upon the filing of an election petition by an employer, unconstitutionally restrict First Amendment rights?

7. Arizona has withdrawn from farmworkers all right to use concerted economic action to secure recognition of a collective bargaining representative and has replaced these rights with an unworkable election procedure. The State has further imposed extensive restrictions on issues of vital concern to workers that can be raised during negotiations. Do such direct and damaging restraints upon the fundamental and essential union functions of recognition and bargaining unconstitutionally infringe upon farmworkers' and their union's right of association?

8. Can a State constitutionally strip a state labor board of all discretion to order an agricultural employer to furnish material, information, time or facilities to allow communication between unions and workers?

9. Does a statute which imposes widespread restraints upon the exercise of fundamental rights by some farmworkers but not of others who are similarly situated violate the Equal Protection Clause when the classification



chosen bears no relation to the stated objectives of the statute?

10. Does a comprehensive and frequently overbroad regulatory statute which makes any violation of any of its terms a crime, thereby making numerous recognized and accepted labor practices punishable as "crimes," prohibit conduct protected by the First Amendment?

## STATEMENT OF THE CASE

In 1972, amid efforts to unionize by Arizona farmworkers and publicity to consumers about the farmworkers' plight,[1] the Arizona Legislature enacted the Agricultural Employment Relations Act, a criminal statute purporting to regulate farm labor relations comprehensively.[2] The AERA declares as Arizona policy: "[A]gricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts establishing their wages and terms and conditions of employment."[3] But the substantive provisions of the Act systematically strip unions, workers, and the interested public of any meaningful way to realize this promise. The Act, which appellant growers helped to draft,[4] expressly makes unlawful and criminal the very methods

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[1] *See, gen.*, testimony of Cesar E. Chavez, A. 290 *et seq.*, describing organizational activities by the United Farm Workers of America, AFL-CIO, in Arizona since approximately 1965.

[2] Arizona Revised Statutes, Title 23, Ch. 8, Section 1381 *et seq.* (A. 504 *et seq.*; hereinafter referred to as "AERA" or "Act".) Unless otherwise specified, all statutory references are to the AERA.

[3] § 1381.

[4] Motion and Application to Intervene as Defendants filed by the Arizona Farm Bureau Federation, the Arizona Grape Growers' Association, and Yuma Citrus Shippers' Association (October 1, 1973), at 4, ¶ III(e).

which the United Farm Workers of America, AFL-CIO (hereinafter "UFW" or "Union") had been using in Arizona to communicate the benefits of unionization to the workers and the facts of labor disputes to the public. The Act broadly proscribes activities which are lawful for other workers in Arizona and throughout the country[5] and inhibits rights of association which are constitutionally guaranteed even in the absence of any statutory regulation.

The AERA governs each stage of the collective bargaining process: communication with the workers and public, selection of representatives, discussion of subjects affecting the employer-employee relationship, and economic levers which make agreement attractive. The three-judge[6] District Court below heard four days of testimony from experts on agricultural labor relations and National Labor Relations Board[7] practice called by both sides[8] and accepted into evidence detailed stipulations by the parties listing

[5]Appellants describe the AERA as "modeled after the NLRA in its overall structure and operation, but tailored in many respects to the peculiar conditions of agricultural labor." Brief for the Appellants, at 5. Comparison of the AERA to the NLRA, however, reveals the deletion, addition, and modification of key NLRA provisions in a manner unrelated to the special characteristics of agriculture. Compare, *e.g.*, § 1385. Significant departures from the NLRA are found which serve no apparent purpose other than to undercut the Act's espoused policy of freedom to organize and to bargain through representatives of the workers' own choosing.

[6]A. 52, 59.

[7]Hereinafter referred to as "NLRB". The National Labor Relations Act, as amended (29 U.S.C. § 150 *et seq.*), is referred to as "NLRA".

[8]The experts were: Cesar E. Chavez, farm laborer, farm labor organizer, and President of the UFW; Stanley Lubin, former NLRB staff attorney, labor attorney and professor; George Campbell, agricultural economist; and James Cherry, former NLRB Officer in Charge for Arizona.



enforcement proceedings under the Act[9] and describing the growing schedules and employment patterns in all major Arizona crops.[10] Upon the evidence adduced at trial, the District Court invalidated the entire statute as frustrating, rather than promoting, association for collective bargaining purposes. It found the election procedures illusory, the prohibitions on speech to publicize labor disputes overbroad, and the twin sanctions for violation of any provision of the Act—criminal penalties and injunctions obtainable *ex parte* and without notice—unconstitutionally oppressive.[11]

The three-judge Court found the Act's election procedures the "threshold" farmworkers must surmount to exer-

[9]Stipulated Statement of Status of Past and Pending Actions Taken in Accordance With the Agricultural Employment Relations Act, A. 79-191 (hereinafter referred to as "Enforcement Stipulation").

[10]Stipulation Regarding Harvest and Pre-Harvest Seasons, A. 192-289 (hereinafter referred to as "Seasonality Stipulation").

[11]The District Court invalidated the Act on the basis of five provisions it found unconstitutional: § 1392 [criminal penalties]; § 1389 [representation elections]; § 1385(B)(8) [consumer publicity]; § 1385(C) [restrictions on access]; and § 1393(B) [prior restraints].

Appellees alleged that eleven sections on their face violate the First and Fourteenth Amendments (A. 23-42): § 1385(B)(7) [prohibitions and restraints on primary boycott speech activities directed to retailers]; § 1385(B(8) [prohibitions and restraints on consumer-directed speech]; § 1385(B)(11) [collective bargaining prohibitions and restraints]; § 1385(B)(12) [prohibitions and restraints on picketing, boycotting, or threats thereof]; § 1385(B)(13) [ban on strike by minorities]; § 1390 [temporary restraining orders without notice]; § 1392 [criminal penalties]; § 1385(C) [denial of access]; § 1382(2) [definition of employer]; and § 1382(6) [definition of labor dispute]; § 1393 [prior restraints].

Appellees further alleged that three additional sections are unconstitutional as applied to farmworkers: § 1389 [representation elections]; and §§ 1384 and 1385(D) [collective bargaining restrictions]. The Pre-Trial Order submitted all of these allegations to the Court for decision. A. 70-71.

cise their right to associate together in unions.[12] From this perspective, the District Court made specific findings of fact, based upon the expert testimony at trial, that the AERA's election process borrows the NLRA form but lacks the substance of a workable democratic selection of representatives in the agricultural context.

The Act requires the filing of a petition which alleges the representative's support by at least thirty percent of the workers in the unit and the prior refusal of the employer to accord recognition.[13] A Board investigation and hearing follows[14] which, the District Court found, on the basis of NLRB experience, is held fourteen to twenty-one days after the petition's filing.[15] The AERA places no time limitations on this process. The Act then allows an employer ten days after the Board directs the election to submit his list of eligible voters' names.[16] From the testimony and the election provisions themselves, the Court calculated that the AERA's election process would take at least six or seven

[12]A. 481.

[13]§ 1389(C)(1).

[14]§ 1389(C).

[15]A. 474.

[16]§ 1389(I). This provision departs from NLRB practice significantly attenuating the AERA's election procedures, as applied to agriculture. In elections under the NLRA, the employer must file a list of names *and addresses* of eligible voters within *seven* days of the direction of an election or approval of a consent election. This mandate facilitates free and informed choice by employees and avoids delay of the election procedures through challenges to voters. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240-43, 61 LRRM 1217, 1218-19 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

The rationale for the AERA's deliberate modification of the NLRB list requirement is unclear. The seasonal character of agriculture argues for shortening, not lengthening, the time for submitting the list. And the migratory nature of the workforce should require an emphasis on addresses, rather than their omission.



weeks for a contested election[17] and termed this transplanting of NLRB procedures of well-known length into an agricultural setting "legislated delay."[18]

Relying on the stipulation and testimony, the three-judge Court found that the length of harvest seasons ranges from three or four weeks for canteloupes, lettuce, and grapes to ten or eleven months for citrus and green onions.[19] The period of peak[20] agricultural employment in these crops ranges from two or three weeks in the more seasonal canteloupes, lettuce, and grapes to the length of the harvest season in citrus and green onions.[21] The Court further found, however, that even in the crops with long harvest seasons, certain factors interfere with stable employment: Work is often intermittent as crops do not follow each other successively, and workers must often switch employers to keep working in the same crop or area. In the citrus, whole crews are "constantly moved from employer to employer throughout the harvest season picking only intermittently for any particular employer for from a few days to a few weeks."[22] In the green onions, despite its long harvest season, the workforce undergoes "tremendous turnover because workers are paid on a daily cash basis and because many minors are employed."[23] Following a schedule distinct from the seasonal pattern of the crops,

[17]A. 474.

[18]A. 499.

[19]A. 471-72.

[20]"Peak period" in this case has been defined as that period of time when fifty per cent or more of the highest number of agricultural workers are employed. A. 471.

[21]A. 471-72.

[22]A. 472.

[23]*Id.*

many workers migrate, leaving an area at the end of a harvest to find work elsewhere, often not returning to the same employer in successive years.[24]

Under such circumstances, as the District Court found, union organizing efforts take approximately three to six weeks, the time occupied by union representatives seeking out all the fields where employees of the employer are working, identifying workers, contacting them, and discussing with them the benefits of unionization.[25] Because of the seasonality, migrancy, and turnover mentioned above, such organizing necessarily cannot be accomplished until the harvest season.[26] Only after these organizing efforts can the lengthy election procedures dictated by the AERA be invoked.

From its findings concerning the seasonal and migratory character of agriculture, the District Court determined the AERA's election process excessively long and conducive to delay, effectively nullifying whatever freedom of association for union organizing purposes the AERA declares as its purpose.[27] In addition to recognizing the constitutional irreconcilability of the lengthy statutory procedure with the overwhelmingly seasonal agricultural industry, the three-judge Court also factually found the Act's limitation of eligible voters to those workers employed in two successive harvests to disenfranchise the great number of migratory and transitory workers.[28] The court concluded that the virtual unworkability of the AERA's election proce-

[24] *Id.*
[25] A. 473.
[26] *Id.*
[27] A. 482-83.
[28] A. 484-85.



dures in the agricultural setting deals a blow of constitutional proportions to the Act's promise to employees of freedom to select and act through freely chosen representatives.[29]

The District Court invalidated other patently unconstitutional provisions of the AERA, also on the basis of their crippling impact on the ability of agricultural employees to exercise First Amendment organizational rights and their "perversion of the expressed intent of the Legislature to allow agricultural employees 'to be free to organize, take concerted action and [bargain] . . .' "[30]

The Court held the Act impermissibly denies unions an opportunity to communicate with Arizona farmworkers

[29] In addition to importing a lengthy election schedule, the AERA enacts significant departures from the NLRA's language by adding provisions favoring the employer. The Act liberalizes the employer's ability to file an election petition, permitting a petition when the employer doubts the bargaining agent's representative status. § 1389(C)(2). Compare 29 U.S.C. § 159(c)(1)(B). The Act extends the time for decertification to allow a petition during the certification period. § 1389(J). Compare 29 U.S.C. § 159(e)(1). And, the AERA shortens the voter eligibility period for economic strikers from one year (29 U.S.C. § 159(c)(3)) to three months (§ 1389(G)) after the commencement of the strike, a period which renders any such strikers in a crop with a season longer than three months ineligible to vote.

The AERA also imposes a requirement, found nowhere in the NLRA, that

> . . . In any election the voters shall be afforded the choice of "no union". If in a representational election where more than one union is on the ballot, and none of the choices receives a majority vote, a second election shall be held. *The second election shall be between the union receiving the highest number of votes and "no union."* A.R.S., § 1389(D); emphasis added.

Where two rival unions garner a majority and the two highest vote totals in a representation election, the AERA frustrates the obvious choice of the workers for union representation by forcing a run-off with the "no union" minority choice, rather than between the two unions.

[30] A. 499.

about unionization or collective bargaining. Based on a factual finding that most farmworkers are migratory or live in areas or labor camps located on the employer's property,[31] the court reasoned that Section 1385(C)'s negation of any requirement to make "materials, information, time, or facilities" available amounts to an affirmative authorization to deny such availability;[32] this provision, by its terms, further allows an employer to ban communication by employee as well as non-employee union organizers.[33] In light of Section 1385(C) and Section 1389(I), the Court concluded that the Act allows a union *only* a list of employees' names, without addresses, ten days after an election has been directed.[34]

The Act sweeps aside rights at other stages of the collective bargaining process. The AERA requires all publicity persuading consumers to refrain from buying or using any agricultural product to be "truthful, honest, and non-deceptive" in content and prohibits primary boycott publicity involved with industry-wide concerns or directed against any trademark or generic name which does not solely include the product of the employer with whom a union has a primary dispute.[35] Based on an array of precedent, the District Court invalidated Section 1385(B)(8), holding that its overbreadth handicaps speech to publicize a labor dispute.[36]

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[31]A. 474, 493.
[32]A. 495-96.
[33]A. 496.
[34]A. 495.
[35]§ 1385(B)(8).
[36]A. 487-92.



The AERA also forbids peaceful persuasion of a store manager to decide not to handle the product of an employer with whom a union has a primary dispute.[37] Upon recognition or certification, the Act denies a union the opportunity to press the employer to bargain about hiring, discharge, transfer of employees, crew size, work assignments, change in operations, sub-contracting, successorship, and a host of other subjects defined as "management rights"[38] Any strike or boycott or threat of a strike or boycott, whether for recognition or a contract, may be halted by an employer's petition for an election[39] or application to the superior court.[40]

The AERA does not merely proscribe the above-mentioned conduct as unfair practices; violation of *any* provision of the Act is a crime, punishable by a fine of up to five thousand dollars and/or one year imprisonment[41] *and* enjoinable *ex parte* without notice.[42] The District Court held that the Act's criminal sanctions enforce the systematic elimination of protected rights of speech and association from the AERA's illusory guarantee of collective bargaining for farmworkers.[43]

The Board and courts have enforced the AERA against the UFW, its members, and its supporters among the public unrelentingly since its passage. By the time of trial in January, 1977, a wide range of the substantive and pro-

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[37]§ 1385(B)(7).
[38]§§ 1384, 1385(D), 1385(B)(11).
[39]§ 1385(B)(12)(C).
[40]§ 1393(B).
[41]§ 1392.
[42]§§ 1390(K), 1393(A), 1393(B).
[43]A. 464-70.

cedural provisions appellees challenge had been enforced, including the restrictions on speech to aid boycott and strike activities, the procedural weapon of summary injunctive relief without notice or hearing, and the election provisions. The Enforcement Stipulation details the various charges, contentions, procedural steps, and outcome in each enforcement case.[44]

For example, Safeway Stores, in a series of actions begun in 1973, used the Act to stop the UFW from informing the public about its labor dispute with grape and lettuce growers. Safeway petitioned an Arizona superior court for injunctive relief generally under all of the unfair labor practice provisions defining union violations, Section 1385 (B).[45] After the superior court ruled subsection (B)(7) unconstitutionally vague, yet granted Safeway injunctive relief against the UFW and its supporters,[46] the Agricultural Employment Relations Board (hereinafter "AERB" or "Board"), continuing to enforce (B)(7), pro-

[44]The stipulation shows, *inter alia*, that seven lawsuits and two administrative complaints have been filed by private parties or the Board against the UFW and its members and supporters to enjoin conduct covered by the Act's provisions.

[45]Enforcement Stipulation, at Item 2; A. 80-82, 93-113.

[46]*Id.*, at Item 2A; A. 80, 93-105. In its opinion, the superior court considered the UFW's conduct under subsections (B)(6), (7), (8), (9), and (12). These subsections broadly restrict secondary boycotts, union appeals to consumers and store management personnel, picketing and strikes. Appellants err in urging that (B)(8), declared unconstitutional by the District Court, was never enforced against the UFW. In the Safeway case, Safeway expressly relied upon § 1385(B)(8) and the superior court examined enforcement of this provision. (A. 102.) In two other lawsuits, liquor distributors and retailers obtained temporary restraining orders without notice to enjoin the UFW's boycott of Gallo wines based upon complaints that alleged violation of all of § 1385(B), including § 1385(B)(8). Enforcement Stipulation, at Items 7 and 13; A. 84, 88.



ceeded on a complaint against the UFW for the very same conduct.[47]

Liquor distributors and retailers, suing individually and in class actions, sought injunctive relief against the UFW's publication of its dispute with Gallo and other wine companies, similarly alleging violation of Section 1385(B) in its entirety.[48]

In other actions, the AERB sought relief against the UFW for specific violations of subsections of Section 1385(B). In one AERB proceeding based on charges filed by five liquor stores, the Board refused to consider the constitutionality of the subsections allegedly violated.[49] The AERB applied to the superior court for injunctive relief against UFW liquor store activities on behalf of the same five stores, and the court issued an injunction banning *all* communication with store managers regarding the boycotted product.[50]

Arizona courts also enforced subsection (B)(10) against the UFW to restrain picketing and strike activities at D'Arrigo Brothers, a lettuce producer, after the employer obtained a temporary restraining order without notice to the Union.[51]

[47]*Id.*, at Item 2F; A. 81. The AERB here charged the UFW with violations of subsections (B)(6), (7), and (8).

[48]*Id.*, at Items 7 and 13; A. 84, 88.

[49]*Id.*, at Item 11; A. 85. The Board's complaint alleged violations of subsections (B)(6) and (7).

[50]*Id.*, at Item 12; A. 87. Appendix D; *see* fn. 159, *infra*. In this case, the Board also alleged violations of subsections (B)(6) and (7).

These two actions were brought in 1975, two years after the superior court ruling in the Safeway case that subsection (B)(7) was unconstitutional and subsequent to the AERB's continued enforcement of (B)(7) in the same case concerning Safeway.

[51]*Id.*, at Item 1; A. 79-80.

Both the Board and private parties have invoked the procedural provisions of the AERA authorizing temporary restraint without notice or hearing. Three separate sections of the Act permit this summary relief.[52] In two actions brought by liquor retailers in response to the UFW's publicity of its dispute with Gallo, temporary restraining orders were issued, without notice to the UFW. One of the two actions was dismissed upon the Union's motion to quash service and never re-served.[53] In the other, a class action, one plaintiff was later dismissed for lack of standing, several plaintiff retailers were found not properly in the class, and the action was ultimately dismissed as to the remaining plaintiffs because of insufficient evidence.[54]

In a third case, the AERB invoked Section 1390(K) to secure a temporary restraining order without notifying the UFW. The injunction restricted all Union communications to the liquor store management under (B)(7), the section held unconstitutional by another superior court.[55]

These expensive and duplicative proceedings in the state courts and before the AERB, spanning several years,[56]

[52]§§ 1390(K), 1393(A), 1393(B).

[53]Enforcement Stipulation, at Item 7; A. 84.

[54]*Id.*, at Item 13; A. 88.

[55]*Id.*, at Item 12; A. 87. *See* n. 50, *supra.*

[56]Between trial and the District Court's judgment and opinion, the AERB obtained a temporary restraining order without notice or hearing under § 1390(K) against the Maricopa County Organizing Project to enjoin picketing by striking vegetable workers.

The Board also issued a complaint against the UFW and the Maricopa County Organizing Project based on charges filed by eight growers. The complaint alleged violations of § 1385(B)(2) [threatening or imposing sanctions for non-compliance with union rules]; § 1385(B)(10) [threatening or engaging in violent conduct]; § 1385(B)(11) [restraining employers in the exercise of management rights]; § 1385(B)(13) [calling a strike without approval by a majority of the employees]; § 1384 [management rights]; and § 1381 [the declaration of policy]. Upon application of the AERB, a temporary restraining order was issued under § 1390(K) based on the complaint. Pursuant to Rule 41(5), Rules of the Supreme Court, defining a party's obligation to bring relevant new matters to the attention of the Court, appellees attach the complaint and temporary restraining order as Appendices E and F, hereto. *See also, Fusari v. Steinberg*, 419 U.S. 379, 387, n. 12; and 390-91 (Conc. Opin. of Burger, C.J.) (1974). The Court may take judicial notice of these documents as official state court records. *Commonwealth of Pennsylvania v. Brown*, 373 F.2d 771 (3rd Cir., 1967); *Wagner v. Fawcett Publications*, 307 F.2d 409 (7th Cir., 1962); *St. Paul Fire & Marine Insurance Co. v. Cunningham*, 257 F.2d 731 (9th Cir., 1958).



forced the UFW and individual members and supporters to defend against allegations of violation of all the union unfair labor practice provisions of the AERA. These actions resulted in substantial restraint of activities aimed at communicating the facts of labor disputes to the public. Temporary injunctions obtained against the UFW without notice and hearing in actions later dismissed or where restrictions on conduct were modified when the Union was given an opportunity to contest the action nonetheless involved considerable infringement of activities and legal costs.[57]

As reflected in the parties' stipulation, the AERA's election procedures have been invoked nine times. The nine petitions filed with the Board potentially involved hundreds of workers.[58] Only three petitions actually resulted in elec-

[57]In addition to the temporary orders which were later dismissed or modified, Safeway initiated contempt proceedings alleging that the UFW and several supporters had violated the superior court's preliminary injunction. The contempt hearing resulted in modification of the injunction. Enforcement Stipulation, at Item 2D; A. 81.

[58]The nine petitions involved Bodine Produce Company, Inc., Ever-Krisp Vegetables, Inc., Tanita Farms, Cook Produce, Cactus Distributors, Inc., J. A. Wood Company, G & S Produce, Shamrock Farms, and Olson Dairy. Enforcement Stipulation, at Items 4, 5, 6, 8, 9 and 10; A. 82-85; Seasonality Stipulation, A. 223, 229, 244 and 270.

tions, all upon the employer's consent.[59] Two of the nine petitions were filed by employers, in each case seeking to halt recognitional picketing.[60] Hearings scheduled in both cases were not held with the petitions being withdrawn by the employers prior to any election. The four remaining petitions were filed by the Teamsters Union at lettuce ranches in the 1974 fall harvest season and were contested by the employers.[61] One of these petitions was dismissed by the Board.[62] Two were withdrawn at the end of the season by the petitioning Teamsters prior to the scheduling or holding of any election.[63] The fourth petition resulted in an election scheduled for a date one week after the end of the harvest season, a time when the majority of the employees had left the ranch; this petition was also withdrawn.[64] These statistics compare with over 400 elections in neighboring California[65] during the first five months of operation of the California Agricultural Labor Relations Act.[66] The principal contestants in California[67] were the

[59]Cook Produce, Enforcement Stipulation, at Item 4A; A. 82-83.
Shamrock Farms, *Id.*, at Item 9; A. 85.
Olson Dairy, *Id.*, at Item 10; A. 85.

[60]J. A. Wood Company, *Id.*, at Item 6; A. 84.
G & S Produce, *Id.*, at Item 8; A. 84.
Section 1385(B)(12)(C) provides that it shall be an unfair labor practice to engage in picketing or boycott activity, or to threaten to do so, where a petition has been filed under § 1389.

[61]Bodine Produce Company, Inc., Ever-Krisp Vegetables, Inc., Tanita Farms, and Cactus Distributors, Inc., Enforcement Stipulation, at Items 4B, 4C, 5; A. 83-84.

[62]Tanita Farms, *Id.*, at Item 4C; A. 83.

[63]Bodine Produce Company, Inc., and Ever-Krisp Vegetables, Inc., *Id.*, at Item 4C; A. 83.

[64]Cactus Distributors, Inc., *Id.*, at Item 5; A. 83-84, 229-30.

[65]A. 328.

[66]California Labor Code, § 1140 *et seq.* (West's Supp. 1978).

[67]A. 315-16.



Teamsters, responsible for six of the nine Arizona petitions, and the UFW.[68]

The UFW lost all but one of the collective bargaining agreements it held in Arizona upon the passage of the AERA, and a significant part of its active membership.[69] Unrebutted testimony at trial establishes that since passage of the Act, the wages and benefits of agricultural workers in Arizona have not kept pace with the improved wages and benefits of farmworkers in other states.[70] Arizona farmworkers' participation in concerted activities to better wages, hours, and working conditions has lessened since the AERA became law in Arizona,[71] and supporters who once assisted in UFW boycott activities have become uncertain of their rights and fearful of harassment.[72]

## SUMMARY OF ARGUMENT

Past enforcement of the AERA, the present threat of continued enforcement, and the Act's facial overbreadth amply establish a justiciable controversy under Article III, Section 2. By trial, many of the challenged substantive and procedural provisions had been enforced against the UFW, its members, and supporters. The State and private parties initiated nine lawsuits and AERB actions. Three

[68]The grower appellants affirmatively alleged in their Motion and Application to Intervene as Defendants that there are essentially two organized groups involved in labor disputes in Arizona, the UFW and the agricultural producers. Motion, *supra*, at n. 4, at 4, ¶ III(f).

[69]A. 399-400. UFW President Cesar E. Chavez testified that the UFW employers who had willingly negotiated contracts with the UFW were not interested in negotiating after the passage of the AERA. A. 399.

[70]A. 398.

[71]A. 399.

[72]A. 398; R. 273.

temporary orders restraining conduct protected by the First Amendment were issued *ex parte* and without notice, one obtained by the Board itself. The enforcement history alone fully reveals a justiciable controversy.

Even were there no enforcement, the AERA's criminal sanctions of up to a five-thousand dollar fine and one year imprisonment and the administrative and judicial enforcement mechanisms available to private parties present a viable threat of prosecution and severe economic injury to the Union, its agents, members, and supporters, against whom the AERA expressly operates. The Act regulates speech and associational conduct protected by the First Amendment. Farmworkers and their supporters may not constitutionally be required to violate the AERA subjecting themselves to criminal prosecution and economic sanctions to obtain relief. *Doe v. Bolton,* 410 U.S. 179 (1973); *Craig v. Boren,* 429 U.S. 190 (1976).

The Act, on its face, also effects a real and substantial suppression of protected First Amendment activities. The whole range of protected speech and associational activity, from oral conversation to handbilling to picketing, may be (and has been) prohibited without notice under the Act's provisions. This facial overbreadth separately states a justiciable controversy.

The District Court properly refused to abstain from ruling on substantial constitutional questions raised by the unambiguous provisions of the statute. *Pullman* abstention is an equitable doctrine applied only where the challenged statute presents a narrow, uncertain issue of *state* law *and* is obviously susceptible of a construction eliminating the federal constitutional question and capable



of resolution in a single, swift state proceeding. *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496 (1941); *Zwickler v. Koota,* 389 U.S. 241 (1967). Neither requirement is satisfied here. The State and growers instead walk a narrow semantic tightrope over a constitutional abyss straining to inject uncertainty into peripheral issues, resolution of which would leave the overriding constitutional questions raised by the appellees untouched. They suggest alleged uncertainty only as to six phrases that appear in three sections of the law but fail to obfuscate the obvious meanings of phrases such as "calendar year". The language of the challenged sections is not uncertain; the federal issues are unavoidable.

Abstention would cause procedural delay and overwhelming costs to the Union, entailing years of state court litigation, as the UFW renews and reserves its federal claims at the state level in isolated enforcement actions, ultimately to return to this Court repeatedly for resolution of the same claims before the Court in this action. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).

While the District Court invalidated the AERA on the basis of five unconstitutional provisions, Appellees address not only these but also present argument as to other provisions fully litigated and briefed before the lower court which are asserted as additional grounds for affirming the judgment of the District Court.[73]

Sections 1393(A), 1393(B), and 1390(K), the procedural provisions affording judicial enforcement of all of the

[73]All these issues were fully briefed and presented to the District Court which found it unnecessary to reach all of them. As this Court stated in *Dandridge v. Williams,* 397 U.S. 471, fn. 6 (1970):

The prevailing party may, of course, assert in a reviewing

Act's substantive provisions, on their face authorize issuance of restraining orders *ex parte* and without notice. Because these provisions sanction prior restraint of rights guaranteed by the First Amendment, all three must fall. *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968). Further, Section 1393(B), found unconstitutional by the District Court for other reasons, places in an employer's hands the power *automatically* to restrain any boycott, strike or threat thereof.

Notice is essential in First Amendment cases to ensure that restraints are narrowly tailored to protect free expression by allowing participation of the opposing parties. *Carroll, supra.* The special vice of those prior restraints sanctioned by the AERA is that communication can be (and in fact has been) suppressed before an adequate determination that it is unprotected by the First Amendment. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973).

Substantively, the statute imposes unconstitutional restrictions on consumer boycott free speech activities. Section 1385(B)(8) prohibits "inducing" or "encouraging" the

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court any ground in support of his judgment whether or not that ground was relied upon or even considered by the trial court. [citations] As the Court said in United States v. American Ry. Express Co., 265 U.S. 425, 435-36, 44 S. Ct. 560, 564, 68 L. Ed. 1087 '[I]t is likewise settled that the appellee may without taking a cross-appeal urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect the decree entered below. It merely asserts additional grounds why the decree should be affirmed.'

*See also, Jaffke v. Dunham,* 352 U.S. 280, 281 (1957); *Swarb v. Lennox,* 405 U.S. 191, 202 (1972), White, concurring; *Ohio Bureau of Employment Service v. Hodory,* 431 U.S. 471 (1977).



ultimate consumer of an agricultural product from buying that product by means other than "truthful, honest or non-deceptive publicity." Thus, this provision places in administrative and judicial hands the power to determine whether speech is true. This Court, in *New York Times v. Sullivan* [*Times Malice*], 376 U.S. 254 (1964), and more recently in *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), has clearly and forcefully stated that the courts are not concerned with the truth or validity of published speech, for such censorship inhibits that vigorous free-wheeling debate long guarded by this Court.

Section 1385(B)(8) further unconstitutionally prohibits "inducing" or "encouraging" a consumer not to buy agricultural products unless they are produced "by an agricultural employer with whom the union has a primary dispute." Such a limitation is impermissible under *A.F.L. v. Swing,* 312 U.S. 321 (1941), where this Court struck down an attempt to halt picketing relating to industry-wide concerns. Under the AERA, handbilling and oral conversation are additionally prohibited.

Section 1385(B)(8) further prohibits inducement of any boycott of trade names, trademarks, or generic names which do not *solely* include the product of the employer with whom a union has a primary dispute, thus eliminating entirely the ability to boycott the great number of products grown by small, medium, and large growers which lose their identities in the marketplace through middlemen, canneries, wineries, marketing associations, and packing houses. This provision also eliminates publication of information of general concern to an entire industry, such as

the use of dangerous pesticides by specific growers. Both labor unions and the public have a legitimate interest in free-flowing discussion of such subjects.

Section 1385(B)(7) prohibits peaceful, orderly conversations by a labor organization or its agents with management personnel of retail stores asking that they refrain from selling boycotted products. Thus, pure speech in aid of a primary boycott is made unlawful and criminal. Arguments based on moral, economic, religious, environmental, labor, political, or any other grounds are prohibited if they encourage retail support for a product boycott during a labor dispute. A clergyman could not ask a store manager to remove a product for moral reasons related to a labor dispute. An environmentalist speaking for a union could not argue that pesticides may contaminate certain produce and therefore should not be sold.

Section 1385(B)(12) broadly prohibits labor organizations from picketing, boycotting, or threatening to picket or boycott an agricultural employer for recognitional or organizational purposes where an election petition has been filed under Section 1389. Since Section 1389(C)(2) allows an employer to file an election petition, Section 1385(B)(12) extends to a grower the unrestricted power to prohibit picketing and boycott activities. Not only is the provision facially overbroad in its regulation of activities protected by the First Amendment, but it operates as an unlawful prior restraint of such activities.

Section 1385(B)(12) further proscribes such picketing and boycott activities where their object is informational communication of a labor dispute's facts, and thus non-



coercive "encouragement" or "inducement" of support for a union's position. This section does not accommodate vital free speech rights to publicize the facts of a labor dispute.

At the heart of the Act stands the recognition procedure adopted by the Arizona Legislature. Limiting past rights, the Act denies farmworkers any opportunity to engage in concerted economic action to compel recognition. In place of economic action, the Legislature has dictated that a collective bargaining representative must be recognized only after an election. However, upon an examination of the statutorily-mandated election procedures, it immediately becomes apparent that workers' efforts to designate a collective representative will necessarily be frustrated. In spite of the short seasons which prevail in Arizona agriculture, the Act requires completion of extensive pre-election proceedings which cannot be concluded within the duration of a season. Not only do these election procedures thus frustrate workers' associational interest in securing recognition of a collective bargaining agent, but the Act statutorily prevents many workers from participating in representation determinations. In spite of the acknowledged migratory pattern in Arizona agriculture, the Act excludes all workers who have not worked for an employer during the preceding calendar year. Without any substantial justification, these workers are relegated to an excluded status.

Even if successful in designating a collective bargaining agent, workers are faced with numerous restrictions upon the right to bargain over wages and terms and conditions of employment which the Act purports to extend. Issues

such as hiring, discharge, suspension, crew size, work assignment, and working hours cannot be bargained forcefully at the negotiating table without subjecting a negotiator to possible criminal penalties and an injunction issued without notice restraining such bargaining. This repudiation of rigorous bargaining on matters of fundamental concern to agricultural employees renders a union impotent to advance the interests of its members. By substantially restraining the effective exercise, in the collective bargaining context, of the right to associate, the Act impermissibly interferes with rights protected by the Constitution.

Section 1385(C) of the Act denies the Board discretion to order "materials, information, time, or facilities" which would enable a labor union or its agents to communicate with farmworkers, who, as the District Court found, migrate and live in labor camps located on property owned by the employer. Even where no alternative means of communication exist, the AERB cannot require that an employer provide *time* or *place* for communication between employees and union representatives; nor can the AERB order an employer to provide *information* only he possesses (with the sole statutory exception of a list of voters' names, without addresses, ten days after a representation election has been directed), permitting a union to reach at least those employees who live off company property. A union has a First Amendment right to communicate its message and employees to listen, but the statutory scheme expressly precludes all possible means of communication, and dis-



ables the AERB from requiring means of communication in any and all cases.

The AERA's restrictions and prohibitions on First Amendment activities effect an important denial of equal protection, for they apply to most farmworkers, but not to those engaged in hauling, stitching or off-the-field packing. Section 1382(1). This distinction bears no relation to the avowed purpose of the AERA to ensure "the uninterrupted production, packing, processing, transporting, and marketing of agricultural products . . ." As undisputed testimony established, a strike by haulers and stitchers or shed workers can stop *all* field work. Yet the Act pointedly excludes these workers. The State and growers point to no compelling interest or rational basis for these exclusions; indeed, none exists. Those farmworkers excluded from the AERA are free to improve their lot by those traditional means denied to farmworkers covered by the Act, perpetuating ghettos of poverty in the fields of Arizona.

Violation of any provision of the AERA is a crime punishable by a fine of up to five thousand dollars and one year in jail, or both. Thus, the AERA is an overbroad criminal statute sweeping traditionally protected First Amendment activities within its ambit.

The AERA is not, as appellants claim, modeled after the NLRA yet tailored to agriculture. One cannot analyze the Arizona statute without concluding that it was deliberately designed to create insurmountable obstacles to the use of traditionally protected First Amendment activities, to the use of the representation procedure, and to the use of collective bargaining as a meaningful tool. While States are laboratories of experimentation, they must experiment

above and not below the constitutional floor. The substantive prohibitions of the AERA provide fuel to keep its procedural engines of prior restraint running. Appellees do not seek in this Court a super-legislature or a council of revision, but simply an affirmation of the District Court's judgment that the AERA is unconstitutional.

## ARGUMENT

### I.

### THIS CHALLENGE TO THE AERA PRESENTS A JUSTICIABLE CONTROVERSY UNDER ARTICLE III ON THE BASIS OF THE ACT'S ACTUAL ENFORCEMENT AGAINST THE UFW AND ITS MEMBERS, ITS THREATENED IMPOSITION OF CRIMINAL SANCTIONS AND ITS FACIAL OVERBREADTH.

The five year enforcement of the AERA against the UFW, its members and supporters, the Act's all-encompassing criminal sanctions, and the AERA's statutory prohibitions and limitations on fundamental rights of speech and association amply satisfy the case or controversy requirement of the U.S. Constitution, Article III, Section 2, and compel the exercise of federal jurisdiction. To avoid this conclusion and deflect consideration of the AERA's fundamental constitutional infirmities, the State[74] minimizes the actual extensive restraint of UFW picketing and boycott activities, glosses over the omnipresent threat of criminal enforcement, and departs from its own characterization of the AERA as a "comprehensive, multi-faceted statute"[75] of interrelated policy determinations. The most elemental logic compels the conclusion that past enforcement of the Act's provisions heightens the present disabling impact of the regulatory system as a whole and stands as a threat of future enforcement.

[74]Hereinafter, unless the context otherwise indicates, the terms "the State" and "the State and the growers" will collectively refer to the Defendant and Intervenor Appellants. Throughout the course of this litigation, the defendants and the intervenors have asserted the same positions. As the record reveals, the grower-intervenors assumed the burden of the defense at trial.



#### A. The State and Private Parties Have Steadily Responded to UFW Activities in Arizona By Enforcing the AERA Against the Union, its Members, and Supporters.

Since passage of the AERA, the State of Arizona and private parties have established a history of enforcement of the Act against the UFW, its farmworker members and public supporters through civil suits and administrative proceedings. The undisputed enforcement, here downplayed by the State, belies Appellants' claim that the Union's challenge to the Statute is somehow "hypothetical." From the facts emerges "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality," necessitating federal court intervention. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941).

As the Enforcement Stipulation[76] details, both the State and numerous private litigants have sought and obtained enforcement of sections of the Act and, on several occasions, the Act's entire union unfair labor practice provision, Section 1385(B), to restrain UFW strike and boycott activities. Safeway Stores filed a suit to halt UFW publicity

[75]Brief for the Appellants, at 15.

[76]A. 79-191; *see, supra*, fn. 9.

informing the public about its labor dispute with grape and lettuce growers, alleging violation of every union unfair labor practice contained in Section 1385(B).[77] After the superior court reviewed the Union's conduct under Section 1385(B), granting injunctive relief under certain of its subsections and finding one, subsection (B)(7) unconstitutionally vague,[78] the AERB initiated a prosecution based on the very same conduct, alleging violation of subsections (B)(6), (7), and (8).[79] Since the Safeway suit, other liquor distributors, suing to enjoin the UFW's publication of its dispute with Gallo and other wine companies, have also alleged violation of Section 1385(B) in its entirety against the UFW.[80]

The Union has also been charged with violation of specific subsections of 1385(B). Notably, the AERB refused to consider the UFW's defense that subsections (B)(6) and (7) were unconstitutional in its prosecution of charges filed by five liquor retailers against the Union and its supporters for boycott activities.[81] Yet the AERB applied to the superior court for injunctive relief on behalf of the same five liquor retailers based on the same charges, without notifying the Union, and obtained an order broadly prohibiting all communication with store managers about the Union's boycott under (B)(7),[82] which had been the subject of the UFW's motion to dismiss before the Board

[77]Enforcement Stipulation, at Item 2; A. 80-82, 97.
[78]*Id.*, at Item 2A; A. 80, 93-105.
[79]*Id.*, at Item 2F; A.81.
[80]*Id.*, at Items 7 and 13; A. 84, 88.
[81]*Id.*, at Item 11; A. 85.
[82]*Id.*, at Item 12; A. 87; Appendix D.



and which two years earlier in the Safeway case had been held unconstitutional on its face by another superior court.

Subsection (B)(10) was also utilized against the UFW and its members to halt picketing and strike activities at D'Arrigo Brothers, a lettuce producer.[83]

Further, the AERB and private parties obtained several of these temporary injunctions to restrain UFW boycott and strike activities by invoking provisions of the AERA which authorize temporary relief without notice. Two such temporary orders, obtained by private liquor retailers without notice to the UFW, were later dismissed on such grounds as insufficient evidence, lack of standing, and improper service, the plaintiffs having achieved restraint of speech and conduct protected by the First Amendment prior to a hearing by their *ex parte* application.[84] Another injunction without notice was secured by the AERB. Without affording the UFW an opportunity to be heard, the Board sought enforcement of Section 1385(B)(7), and obtained the injunction mentioned above banning all communication with store management personnel pertaining to the boycotted product.[85]

Based on the Enforcement Stipulation setting forth the various enforcement proceedings against the UFW, the District Court correctly concluded that "this case is not hypothetical, abstract, or generalized."[86]

In addition, unrebutted testimony at trial established the AERA's tangible injury to the Union through its loss

[83]*Id.*, at Item 1; A. 79-80.
[84]*Id.*, at Items 7 and 13; A. 84, 88.
[85]*Id.*, at Item 12; A. 87; Appendix D.
[86]A. 463.

of collective bargaining agreements,[87] membership,[88] organizational support among Arizona farmworkers,[89] and boycott support,[90] as well as legal costs to defend enforcement actions.[91]

The State and the growers studiously ignore the substantial history of actual enforcement of the AERA against the UFW, in a conspicuous reversal of the growers' factual allegations in their Motion and Application to Intervene as Defendants.[92] There, describing their interest in the District Court action, the grower-appellants allege:

> Essentially, there are two organized groups involved in the labor disputes since passage of the Act—the United Farm Workers Union and the agricultural producers represented by the intervenor-applicants associations. Where the validity of the entire Act is challenged by one of the two contending parties, it is important that the legal perspective of the other contending party be considered.[93]

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[87] A. 399-400.

[88] *Id.*

[89] A. 399.

[90] A. 398.

[91] R. 267.

[92] Motion, *supra*, n. 4, at 4, ¶ III(f).

[93] *Id.*, at 4, ¶ III(f).

The growers also alleged, as an important interest, a view of the Act, as it may be applied, as an integrated whole.

> The Arizona Agricultural Employment Relations Act, A.R.S. § 23-1389-1395, is a comprehensive act, specifically designed to totally regulate agricultural employees and employers in the field of labor relations. Numerous protections are afforded those employers represented by the intervenor-applicants via this Agricultural Employment Relations Act. These protections include in part, sanction against unfair labor practices, restrictions on strike and boycott activities, procedures for resolving issues of representation, and criminal sanctions in the Act which provide numerous and important protections for the members of the intervenor-applicants. Inasmuch as this suit attempts to declare the Arizona Agricultural Employment Relations Act unconstitutional, this lawsuit has a direct and pecuniary effect upon the interest of the intervenor-applicants . . . *Id.*, at 3, ¶ III(a).



Now, to minimize the same extensive enforcement which prompted the growers to assume the burden of the defense in this case, they disconnect the pattern of Board and private enforcement of the Act and fragment the "comprehensive, multi-faceted statute," walking a narrow semantic tightrope to urge that the fragmentary portions may be dissociated from the actual adversary clashes between the principal "contending parties," the UFW and the growers.[94] Their narrow position is untenable; the considerable extent of past enforcement of the AERA against the UFW does not permit such a constrained analysis. Moreover, the type of injury suffered by the UFW—restraint without notice, the necessity of defending against repetitious litigation and broad limitations on fundamental rights, loss of contracts, membership, and support—can only be attributed to the Act as a whole. The ample history of enforcement of the AERA against the UFW unquestionably satisfies the justiciability requirements of Article III.

The State's view of the AERA and its operation as a collection of disconnected fragments also fails to overcome the weighty presumption against severability of the Act's provisions. As the State and growers readily admit, the AERA is a comprehensive regulatory scheme designed to govern the field of farm labor relations in a total, integrated manner.[95] The Act's Declaration of Policy, Section 1381, makes clear that the election procedures, collective

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[94] *See*, Brief for the Appellants, at 34-35.

[95] Brief for the Appellants, at 15; *see also*, fn. 93, *supra*.

bargaining provisions, unfair labor practices, particularly those restricting boycott activities, and enforcement provisions are all essential to the regulatory balance struck by the Arizona Legislature. Plainly, from a reading of the Act, operation of the various provisions presumes the existence of the others. In such a case, where statutory provisions "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not pass the residue independently," then, upon a finding some of the provisions unconstitutional, the entire statute must fall. *Pollack v. Farmers Loan & Trust Co.*, 158 U.S. 601, 636 (1895).

The AERA's lack of a severability clause underscores the statute's integrated character. The absence of such a clause gives rise to a presumption that the Legislature intended it be effective as an unmutilated whole. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936). And even where a severability clause appears, the Court will refuse to honor it if the result "would be to create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973); *see also, Meek v. Pittinger*, 421 U.S. 349 (1975). That the Arizona Legislature departed from the model of the NLRA, which does contain a severability clause,[96] conclusively establishes its intent that the AERA operate with *all* of its

[96]29 U.S.C. § 166.



provisions intact. Thus, the constitutional defects in the challenged provisions of the AERA invalidate the entire Act.

Balancing on the same semantic tightrope, the State claims the Appellees lack standing to allege a justiciable controversy. It argues that no harm to any specific individual has been shown, nor a showing made that any possibly harmed individual could not bring suit.[97] Again, such a strained view of the Act, of the "contending parties" regulated by it, and of the pattern of enforcement broadly touching virtually every aspect of the Union's activities does not find support in the well-settled doctrine of standing.

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Baker v. Carr, 369 U.S. 186 (1962). (*Warth v. Seldin*, 422 U.S. 490, 499 (1975).)

"Personal stake" in the outcome of a controversy sufficient to confer standing to challenge a regulatory statute exists when the challenger is "within the zone of interests protected by the Act" (*Barlow v. Collins*, 397 U.S. 159, 164

[97]Brief for the Appellants, at 33-34.

(1970)) or when the plaintiff has suffered "injury in fact, economic or otherwise." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 152 (1970). In short, standing is embodied in an action between the logical parties to adjudicate the statute's validity with the necessary degree of contentiousness, imparting the justiciability necessary to a case or controversy under Article III. *Flast v. Cohen,* 392 U.S. 83, 102 (1968); *Golden v. Zwickler,* 394 U.S. 103 (1969). In *Barlow v. Collins, supra,* this Court found tenant-farmer participants in a cotton program possessed a sufficient "personal stake" to attack a regulation which made rent for land used to grow a crop subject to assignment of advance subsidies under the program. This Court found the tenant farmers injured before the regulation's enforcement, upon their allegation that the regulation would deprive them of bargaining power they might otherwise gain by using advance subsidies to attain financial independence. The Act under which the regulation was promulgated specifically governed tenant farmers, giving plaintiffs the "personal stake" sufficient to impart justiciability to their claim.

By these standards, the UFW and its agents, members, and supporters have standing to challenge the AERA. They fall squarely within the specific regulatory ambit of the Act, have all been directly and severely injured by steady enforcement of the Act against them since its passage, and are precisely the parties to challenge the Act with the necessary interest. Moreover, this Court has recognized a union's standing to raise any claim that a member has standing to raise, since a union acts only through its members. *Allee v. Medrano,* 416 U.S. 802, 819, n. 13 (1974);



*see also, N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958); *Carey v. Population Services International,* 431 U.S. 678 (1977). Not only does the record in this case establish the UFW's actual injury from the operation of the AERA, but recounts numerous instances of restraint of its members and supporters' constitutionally-protected conduct, also conferring standing on the Union. The State and growers' claim of lack of standing conflicts with the growers' acknowledgment that they and the UFW have been the principal combatants under the AERA since its passage[98] and ignores principles established by this Court under Article III.

### B. The AERA Presents an Existing Threat of Enforcement and Thus States a Case or Controversy Under Article III.

Article III's case or controversy requirement does not limit federal jurisdiction to cases of direct injury; a justiciable controversy arises from threatened enforcement as well. The enactment of the AERA mandates its enforcement. No matter how minutely the growers and the State fragment the Act nor how minimally they characterize past enforcement, they cannot eradicate the obvious threat of enforcement.

This Court has consistently recognized that a challenge to a penal statute affecting the exercise of constitutional rights states a justiciable controversy in advance of any actual prosecution. A facial challenge on First Amendment overbreadth or vagueness grounds further heightens the personal stake, immediacy, and necessity for judicial reso-

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[98] *See, supra,* text accompanying fn. 93.

lution for the very existence of a statute which sweeps too broadly in areas protected by the First Amendment creates a pervasive chill on the exercise of precious rights.

> Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. (*Thornhill v. Alabama,* 310 U.S. 88, 98 (1940).)

*See also, Baggett v. Bullitt*, 377 U.S. 360 (1964). Anticipatory or preventive challenges of such statutes have long been recognized. *Doe v. Bolton, supra,* 410 U.S. 179; *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *Allee v. Medrano, supra,* 416 U.S. 802; *Epperson v. Arkansas,* 393 U.S. 97 (1968).

In *Doe v. Bolton, supra,* physicians challenged a state criminal statute regulating abortion. Even though not one of the physician-plaintiffs had been prosecuted or threatened with prosecution under the statute, this Court recognized a "sufficiently direct threat of personal detriment" in the express application of the criminal provisions to physicians and the logical expectation of a newly-enacted statute's enforcement. *Id.*, 410 U.S. at 189. Because, by practicing their profession, the plaintiff-physicians risked violation of the statute, the potential for enforcement was not "chimerical." *Poe v. Ullman,* 367 U.S. 497, 508 (1961). This Court understandably rejected requiring plaintiffs to expose themselves to arrest or prosecution as a prerequisite for challenging the statute's infringement of the constitutional rights of the physicians' patients.



The AERA is a criminal statute regulating the exercise of First Amendment rights of speech and association. Consciously departing from the NLRA,[99] the Arizona legislature inserted Section 1392, which mandates a fine of not more than five thousand dollars, imprisonment for up to a year, or both for violation of *any* provision of the Act. By its terms, Section 1392 backs up the Act's regulation of every step of the collective bargaining process from organizing and selecting bargaining representatives to discussions at the bargaining table to public communication of the facts of labor disputes. The District Court held that Section 1392, along with other facially overbroad provisions of the AERA, " 'hangs over [people's] heads like a Sword of Damocles.' *Arnett v. Kennedy*, 416 U.S. 134 (1974)."[100] The State argues that "the only reason that the District Court was able to find a Damoclean effect at all"[101] is that it "consistently assumed the worst"[102] in reading the Act's provisions and argues that Section 1392 has not yet been enforced. Ironically, the State, charged with enforcing the legislature's mandate, thus asserts that the District Court erred in recognizing that the State might indeed carry out its duty. Such dubious claims cannot form the foundation upon which First Amendment guarantees rest.

The AERA is directed to appellees; the criminal penalties are plain on the face of the Act; and promulgation of this

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[99]The NLRA, as amended, contains no broad provision criminally penalizing unions or employers for engaging in activities governed by the Act's representation and unfair labor practice provisions. *See*, 29 U.S.C. § 150, *et seq.*

[100]A. 469.

[101]*Id.*

[102]*Id.*

comprehensive labor regulatory system necessarily contemplates comprehensive enforcement. Similar to the physicians' challenge in *Doe v. Bolton, supra*, 410 U.S. 179, appellees' facial challenge to the AERA presents a justiciable controversy, irrespective of the extent of enforcement or criminal prosecution.

Just as an actual controversy may exist without an actual criminal prosecution, a controversy under Article III may also exist without the necessity of incurring economic injury from the operation of an unconstitutional statute. In *Craig v. Boren, supra*, 429 U.S. 190, this Court held that plaintiff beer vendor could not be forced to choose in advance between "direct economic injury through the constriction of her buyers' market" under statutes discriminatorily prohibiting sale of 3.2% beer to men under 21 and to women under 18 and possible loss of her license for disobeying the legal duties created by the statutory sections. Rejecting defendants' Article III challenge, this Court stated, "[C]ertainly, no suggestion will be heard that [petitioner's] anticipatory challenge offends the normal requirements governing such action." *Id.*, at 196, n. 5. This Court also unanimously approved a challenge to an ordinance prohibiting posting of "For Sale" and "Sold" placards even though the property in question had been sold during the litigation, finding an "immediate prospect" that the petitioning realtor would desire to place such signs on other property in the township. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). *See also, Carey v. Population Services International, supra*, 431 U.S. 678; *Nyquist v. Mauclet*, 432 U.S. 1, n. 7 (1977); *Epperson v. Arkansas, supra*, 393 U.S. 97.



The threat of administrative or judicial enforcement posed by Arizona grower-appellants adds substantiality and clarity to the controversy presented to this Court. The growers have an obvious interest in invoking the AERA's regulatory mechanism to curtail union activities among their employees. Unlike the cases above where prosecution or economic detriment depended solely upon the initiative of the State, the AERA's enforcement provisions can be invoked by private parties. As the Enforcement Stipulation reflects, private parties have sought and obtained administrative and injunctive relief, on occasions without notice, against the UFW under provisions held unconstitutional by the District Court and challenged by appellees. Similarly, the Act's unconstitutionally burdensome and workable election procedures, which mock the Act's promise of organizational freedom, place the Union in the same position as the beer vendor in *Craig v. Boren, supra*, 429 U.S. 190, and the realtor in *Linmark Associates, Inc. v. Township of Willingboro, supra*, 431 U.S. 85. To avoid application of the unconstitutional Arizona statute, the Union must forego activities which constitute its *raison d'etre*. As the Court succinctly stated in *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 143 (1974),

> Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. (Citations). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S., at 593.

The threat of criminal prosecution or economic injury from operation of unconstitutional provisions of the AERA is even more concrete in this case than in the anticipatory challenges approved by this Court, for the past enforcement of the Act portends future enforcement. An *ex parte* injunction obtained without notice to the Union restraining all speech to store managers does not present a hypothetical enforcement of the Act. Such an injunction has been issued against the UFW.[103] That the Act's election procedures do not facilitate elections is documented by the Enforcement Stipulation.[104] The State's essential case or controversy argument—that the AERA has not been enforced *enough* against the UFW, its farmworker members, and its supporters—exhibits a narrow and subjective view of Article III which this Court has never approached. The Act's past enforcement is the most powerful proof of the threat of continued enforcement.[105]

The State's claim that the Court does not review comprehensive regulatory statutes in advance of their appli-

[103]Enforcement Stipulation, at Item 12; A. 87; Appendix D.

[104]*Id.*, at Items 4, 5, 6, 8, 9, and 10; A. 82-85.

[105]That the AERA has not been enforced to a greater extent does not minimize the threat of future enforcement. Even abandonment of union organizing under an unconstitutional statute will not eliminate a live controversy under Article III. Rather, such cessation may itself constitute injury sufficient to keep the controversy alive. When the union pursued precisely this course in *Allee v. Medrano, supra,* 416 U.S. at 810-11, the Court held:

> We may not assume that because during this period they directed their efforts to the judicial battle, they have abandoned their principal cause. Rather, the very purpose of the suit was to seek protection of the federal court so that the efforts at unionization could be renewed . . . The appellee Union remains very much a live organization and its goal continues to be the unionization of farmworkers. The essential controversy is therefore not moot, but very much alive.



cation is similarly meritless. In the companion case of *Doe v. Bolton, supra,* 410 U.S. 179 (1973) and *Roe v. Wade,* 410 U.S. 113 (1973), this Court set forth constitutional guidelines for state abortion laws. In *Baker v. Carr,* 369 U.S. 186 (1962), the Court considered a challenge to a state apportionment statute, directing:

> When challenges to state action respecting matters of "the administration of the affairs of the State and the officers through whom they are conducted" have rested on claims of constitutional deprivation which are amenable to judicial correction, this Court has acted upon its view of the merits of the claim. (*Id.*, at 229.)
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> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. [*Colgrove v. Green*] 364 U.S. at 347, 81 S.Ct. at 130." (*Id.*, at 231).

Other examples include *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) and *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923).[106]

[106]The State relies principally on three cases to support its blanket assertion that the Court will decline, as a matter of course, to review comprehensive state legislation in advance of application, *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450 (1945); *American Federation of Labor v. Watson,* 327 U.S. 582 (1946); and *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

In *McAdory,* plaintiff unions did not challenge the state statute's express requirement that labor unions functioning in the State file reports but alleged that failure to file would infringe their rights to continue functioning. The Court, noting a state court holding that the statute did not authorize the granting or withholding of a license to a union, found that the statute's criminal penalty, which it upheld, applied to failure to file a report alone and nowhere further restrained the union's functioning. Thus, the Court held that

Any blanket argument that this Court will not review a regulatory program must be discarded as illogical. The existence of serious constitutional infirmities interacting in an integrated regulatory statute, in fact, compels review under the principles of federalism. See, *Steffel v. Thompson, supra,* 415 U.S. at 473-74.

### C. Appellees' Challenge to the AERA on Facial Overbreadth Grounds Meets the Requirements of a Justiciable Controversy.

Relying exclusively on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the State argues that this case is not "appropriate"[107] for application of the overbreadth doctrine, claiming that the alleged overbreadth of the statute is not

until it was presented with a case showing the statute applied other than as written, there was no case or controversy.

By contrast, the UFW contends that the AERA, on its face, directly abridges associational and speech guarantees both by the terms of specific sections and by the all-enveloping criminal sanctions.

In *Watson*, the Court abstained under the *Pullman* doctrine (*see, infra,* Part II) to allow the state courts to determine whether the challenged right to work provision was self-executing and in what manner. Before doing so, however, the Court found that plaintiffs had alleged a substantial controversy and irreparable injury. Under *Pullman* abstention, of course, the federal court retains jurisdiction of the controversy pending state decision.

In *Broadrick*, the Court was presented with a challenge to only two sections of a comprehensive state statute regulating partisan political activity of state employees, and it considered both sections. The Court rejected the overbreadth challenge to the two provisions on the ground that plaintiffs' conduct not only flagrantly violated them both but also unquestionably fell outside First Amendment protection. Therefore, plaintiffs had no standing to challenge the statute on overbreadth grounds. Unlike *Broadrick*, appellees here do not challenge the AERA from a basis of clearly unprotected activity; rather, appellees seek vindication of basic constitutional rights denied by the express language of the Act.

[107]Brief for the Appellants, at 35.



"real and substantial" because the criminal provisions have not yet been enforced.[108] *Broadrick*, however, solidly affirms appellees' challenge to the Act on facial overbreadth grounds.

In *Broadrick*, this Court summarized that facial overbreadth claims are limited to statutes which, by their terms, seek to regulate only spoken words; rights of association; time, place, and manner of expressive or communicative conduct; and standardless discretionary power resulting in virtually unreviewable prior restraints on First Amendment rights. *Id.*, 413 U.S. at 612-13. As the regulatory scope of the challenged statute moves from the above four categories to that of ordinary criminal statutes, the requirement that the overbreadth be "real and substantial" before the statute may be challenged comes into play. *Id.*, at 615-16.

The AERA, by its terms, regulates associational conduct. Additionally, the Act proscribes peaceful discussion with store managers;[109] limits the truthful content of speech to consumers in the context of a primary boycott;[110] and places time, place, and manner restrictions on communications with workers.[111] The Act's broad prohibitions are further cemented by penal sanctions[112] and the availability of *ex parte* temporary restraint without notice.[113] By its express terms, the AERA imposes stringent regulation under *Broadrick's* four categories on associational rights; pure

[108]*Id.*, at 36-37.

[109]§ 1385(B)(7); *see,* discussion, Part V, *infra.*

[110]§ 1385(B)(8); *see,* discussion, Part IV, *infra.*

[111]§ 1385(C); *see,* discussion, Part VIII, *infra.*

[112]§ 1392; *see,* discussion, Part X, *infra.*

[113]§§ 1390(K), 1393(A), 1393(B); *see,* discussion, Part III, *infra.*

speech; time, place, and manner of communicative and expressive conduct; and it allows private parties, as well as local officials, discretion to impose prior restraints on threatened activity protected by the First Amendment. As a statute of specific regulatory scope, then, the AERA is plainly overbroad on its face, and appellees state a justiciable controversy by their challenge, without respect to actual enforcement against the Union.

Moreover, the AERA's overbreadth is "real and substantial." The deterrent effect of an overbroad statute has been found both real and substantial where, to avoid operation of the statute, the person regulated must either restrict constitutionally-protected activity or take steps which are "expensive or even physically impracticable." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975). To avoid operation of the AERA, the UFW must restrict speech and associational activities protected by the First Amendment; no steps, economic or physical, short of such restriction are available. The challenged overbreadth in this case is, therefore, both real and substantial.

Appellees present a justiciable controversy to this Court, based on a history of actual enforcement of the AERA against the UFW, on the practical threat of enforcement implicit in the recent promulgation of the Act and its specific application to appellees, and on the Act's facially overbroad infringement of First Amendment rights. The State's deliberate disregard of its own enforcement of the AERA, its efforts to fragment the regulatory impact of the Act's provisions, and its strait jacketed view of the case or controversy requirement of Article III all must be



rejected out of hand. Appellees' challenge compels the exercise of federal jurisdiction.

## II.

## APPLICATION OF THE DISCRETIONARY DOCTRINE OF ABSTENTION IS INAPPROPRIATE IN THIS CASE SINCE THE CHALLENGE TO THE AERA DOES NOT REST ON UNCERTAIN QUESTIONS OF STATE LAW AND ABSTENTION WOULD RESULT IN INORDINATE DELAY, EXPENSE AND DEPRIVATION OF CONSTITUTIONAL RIGHTS.

The State argues that deferring the complex issues raised in this appeal to state court resolution under the *Pullman*[114] doctrine will eliminate the AERA's constitutional infirmities as state courts interpret and administer the statute. Abstaining in this case, however, will merely side-step substantial constitutional issues, only to see their return to this Court greatly exacerbated, after long delays, and in piece-meal fashion.

By its nature, *Pullman* abstention inevitably occasions delay and the consequent danger that valuable federal rights will be lost without expeditious adjudication in the federal courts. Hence, the Court will abstain only in "special circumstances" and only upon careful consideration of the facts of each case. *Kusper v. Pontikes,* 414 U.S. 51, 55 (1973); *Zwickler v. Koota, supra,* 389 U.S. at 248; *Baggett v. Bullitt, supra,* 377 U.S. 360, 375-79; *Railroad Comm'n v. Pullman, supra,* 312 U.S. at 500.

Where, as here, a statute is attacked as facially violative of the First Amendment, "to force the plaintiff who has

[114] *Railroad Comm'n of Texas v. Pullman Co., supra,* 312 U.S. 496.

commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota, supra,* 389 U.S. at 252. As the Court observed in *Baggett v. Bullitt, supra,* 377 U.S. at 378-79:

> We also cannot ignore that abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time . . , a result quite costly where the vagueness of a state statute may inhibit the exercise of First Amendment freedoms . . . where the vagueness of the statute deters constitutionally protected conduct, "the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151, 80 S.Ct. 215, 218.

Following these principles, federal courts do not abstain often, nor lightly. When they do, the issues upon which federal claims are premised involve a narrow, uncertain state law question peculiarly within the province of the local courts (*Reetz v. Bozanich,* 397 U.S. 82 (1970); *Fornaris v. Ridge Tool Co.,* 400 U.S. 41 (1970)), and "obviously susceptible" of a construction which will eliminate or substantially change the federal question and capable of resolution in a single, swift state proceeding. *Zwickler v. Koota, supra,* 389 U.S. at 251, n. 14; *see also, Steffel v. Thompson, supra,* 415 U.S. 452; *Harman v. Forssenius,* 380 U.S. 528, 534 (1965).

However, where resolution of the state law question would not significantly affect the federal claim (*Chicago v. Atchison, T. & S.F. Ry. Co.,* 357 U.S. 77 (1958); *Public*



*Utilities Comm'n v. United Fuel Gas Co.,* 317 U.S. 456, 462-63 (1943)) or where, even in the instance of a narrow issue of underlying state law, the litigation has been long delayed (*Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 329 (1964)), this Court has held abstention inappropriate.

When a federal court exercises its discretion to abstain under *Pullman,* it retains jurisdiction of the case pending resolution of the state law question. In its most recent cases, the Court has evinced particular concern with the delay and expense inherent in applying the *Pullman* doctrine and has relied heavily on state rules permitting direct certification of state law questions to a state appellate court for prompt clarification.[115]

Thus, *Pullman* abstention involves both a *substantive* inquiry as to whether narrow, uncertain local law questions, obviously susceptible to a construction which will obviate constitutional determinations underlie the federal claims and a *practical* inquiry into the feasibility of a prompt state resolution. In the instant case, the obvious federal claims based on the face of the statute, as well as

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[115] In *Bellotti v. Baird,* 428 U.S. 132, 150-51 (1976), the Court held:

> This Court often has remarked that the equitable practice of abstention is limited by considerations of "the delay and expense to which application of the abstention doctrine inevitably gives rise." [Citation.] As we have also noted, however, the availability of an adequate certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v. Schein, 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, 40 L.Ed.2d 215, 220 (1974).
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> [T]he availability of certification greatly simplifies the [*Pullman* abstention] analysis.

Accord, *Elkins v. Moreno,* 435 U.S. 647, 662, n. 15 (1978).

the practical procedural cost of abstention, unquestionably militate against remitting the parties to state courts only to have them return years hence in piece-meal contexts, all involving precisely the same constitutional issues presently before this Court.

### A. Appellees' Challenge to the AERA Does Not Raise Narrow, Uncertain State Law Questions, Rather, It Focuses On Basic And Pervasive Federal Constitutional Defects.

Substantively, the State endeavors to formulate hypotheticals which it urges are susceptible to construction by Arizona courts to avoid or lessen the impact of constitutionally objectionable portions of the Act. Its hypotheticals joust Quixotically at the fringes of the statute, falling far short of the deep-seated and pervasive constitutional weaknesses of the Act. The AERA is constitutionally infirm on its face; it does not require the Court to "forecast" narrow, uncertain questions of local law. *Railroad Comm'n v. Pullman, supra,* 312 U.S. at 499. Underneath the superficiality of its examples, the state asks this Court to abstain so that Arizona courts may have an opportunity to resolve what are obviously, at base, federal constitutional questions. The abstention doctrine does not, however, require that a federal court stay its hand in order to allow state courts first to apply federal constitutional principles to save unconstitutional state statutes. *Procunier v. Martinez,* 416 U.S. 396, 400-01 (1974); *Zwickler v. Koota, supra,* 389 U.S. at 251; *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971). As the Court held in *England v. Louisiana State Board of Medical Examiners, supra,* 375 U.S. at 415-16:



> Abstention is a judge-fashioned vehicle for according appropriate deference to the "respective competence of the state and federal court systems." Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law. Accordingly, we have on several occasions explicitly recognized that abstention "does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise." [Citations.]

Remitting the Union and its members to state court would only cause the same constitutional questions to be brought in the same form at the state level and eventually to find their way to this Court again for review. Application of state statutory law will neither obviate nor materially change the necessary constitutional determinations.

The State also curiously seeks refuge in the number of challenged constitutional defects, contending thereby that the AERA must somehow involve some uncertain questions of state law. It points to no concrete bases in state law which would provide the logic missing from its argument. Rather than imply that some unspecified state construction will save the statute, the sheer number of constitutional infirmities compels immediate consideration of the merits by this Court to avoid the long delay and inhibition of constitutional rights which abstention will cause. As to the

Union's challenges of various provisions regulating its organizing and collective bargaining activities, this Court has held that constitutionally vague statutes, open to infinite interpretations and incapable of limitation without extensive adjudications, do not first call for state narrowing interpretations. *Baggett v. Bullitt, supra,* 377 U.S. at 376-78. In a recent application of this principle, a constitutional attack on state regulations governing censorship of prisoner's mail, the Court explained:

> In *Baggett* the Court considered the constitutionality of loyalty oaths required of certain state employees as a condition of employment. For the purpose of applying the doctrine of abstention the Court distinguished between two kinds of vagueness attacks. Where the case turns on the applicability of a state statute or regulation to a particular person or a defined course of conduct, resolution of the unsettled question of state law may eliminate any need for constitutional adjudication. 377 U.S., at 376-377, 84 S.Ct., at 1325-1326. Abstention is therefore appropriate. Where, however, as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. Id., at 378, 84 S.Ct., at 1326. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require "extensive adjudications, under the impact of a variety of factual situations," to bring the challenged statute or regulation "within the bounds of permissible constitutional certainty." Ibid. (*Procunier v. Martinez, supra,* 416 U.S. at 401, n. 5.)



Any court examining the AERA must face the patent constitutional defects in its provisions. The State does not contest the basic constitutional nature of the inquiry into the Act's prohibitions on the right to strike and boycott, its limitations on content of speech, its extensive disenfranchisement of workers in the exercise of the associational conduct of voting, its all encompassing penal and injunctive sanctions, and other provisions which, by their terms, have a certain and undisputed impact on rights to associate and to speak. Rather, Appellants' examples of questions avoidable by abstention reach out for peripheral issues into which they attempt to inject some uncertainty, in the end only highlighting the predominance of constitutional problems posed by the statute as a whole.

In its Jurisdictional Statement (at 20-21), the state argues that the term "calendar year" in Section 1382(1)[116] is uncertain. It provides no basis under Arizona law for this Court to conclude that if it abstains, forcing the delay and expense attendant on abstention, Arizona courts would not simply affirm that "calendar year" means January 1 through December 31. See, *Addison v. Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 617-18 (1944). When the Arizona Legislature wanted to designate a year in less precise terms, it knew how to do so. *See,* Section 1385(B)(12)(b). In its brief on the merits, the state proffers an obscured

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[116]Section 1382(1) provides, in relevant part:

> "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceeding calendar year . . . "Agricultural employee, temporary" means any employee over sixteen years of age who has been employed by a particular agricultural employer and who has been so employed during the preceeding calendar year . . .

restatement of the same claim. Conceding that the District Court's reading of the plain language of Section 1382(1) to impose a successive employment requirement on the definition of "employee" has a "significant" impact on applying the AERA's election procedures to the seasonal migrant farmworker pattern, the State vaguely argues that the District Court should have abstained because the AERB could "treat the matter." Brief for the Appellants, at 39-40. The definition of "employee" under the Act unambiguously requires employment "during the preceding calendar year." The State suggests no way Arizona courts could "treat" this language to avoid its wholesale disenfranchisement of seasonal and migrant workers, without rewriting the statute; indeed, it cannot.

The other hypothetical upon which the State rests its argument for abstention as to the election procedures posits that, instead of the District Court's observation that general application of Arizona's Administrative Procedure Act would mean a twenty day period between the filing of an election petition and the pre-election hearing, abstention could result in a state court finding that the AERA's provision for "an appropriate hearing on due notice"[117] after a petition has been filed renders the Administrative Procedure Act inapplicable.[118] The District Court invalidated the AERA's election procedures because of their excessive length and permissible delays *as a whole*[119] and found, among other delays, that under the NLRA, which also contains a "hearing on due notice" requirement,[120] the pre-

[117]Section 1389(C).

[118]Brief for the Appellants, at 38-39.

[119]A. 482.

[120]29 U.S.C. § 159(c).



election hearing is not held until from fourteen to twenty-one days after the petition is filed.[121] The District Court based this factual finding solidly on expert testimony, testimony that would merely be repeated in a state court were this Court to abstain. Whether the Administrative Procedure Act applies to pre-election hearings or does not is immaterial to the District Court's conclusion that the Act's election procedures as applied to farmworkers are inherently unworkable and destructive of constitutional rights.[122]

Similarly, the State's plea to this Court to abstain as to the meaning of "facilities" in Section 1385(C) dissolves under analysis. Section 1385(C) affirmatively states that "No employer shall be required to furnish or make available to a labor organization . . . materials, information, time or facilities to enable such . . . labor organization . . . to communicate with employees of the employer, members of the labor organization, its supporters, or adherents." The District Court held that Section 1385(C) authorizes an employer to deny a union time *and* place for communi-

[121]A. 474.

[122]The State also hypothesizes that whether the AERA may be interpreted to allow or preclude the issuance of bargaining orders is an uncertain issue of state law meriting abstention. The District Court's discussion of bargaining orders in the context of the AERA (A. 475, 486-87) was not essential to its finding that the Act's election procedures, by their length and potential for delay, inhibit, rather than allow, freedom of association for collective bargaining purposes. The District Court simply observed that the Act's emphasis on secret ballot elections encourages employer interference with the election process for which there is no statutory remedy of an order to bargain.

Providing a bargaining order remedy for employer unfair labor practices which interfere with elections, however, would not cure the constitutional defect of the AERA's excessively long and delayable election procedures, for the Act's provisions allow an employer to use lawful conduct to delay the process, conduct which a bargaining order remedy could not reach.

cation with workers, and thus affirmatively infringes on First Amendment rights of speech and association.[123] The State, though attempting to inject uncertainty into the section's all-inclusive ban,[124] nowhere suggests that Arizona has a state law basis for interpreting this provision which would eliminate the need for constitutional adjudication. Abstention would merely defer consideration of an overridingly federal constitutional issue to the state courts, again improper abdication of federal responsibility. Moreover, any possible uncertainty raised by the statutory language exemplifies the type which the Court in *Baggett v. Bullitt, supra,* 377 U.S. 360, and *Procunier v. Martinez, supra,* 416 U.S. 396, defines as inappropriate for application of the abstention doctrine. To the extent that Section 1385 (C) has uncertain impact on associational rights under the AERA, no single adjudication by a state court could eliminate the constitutional difficulties and bring the provision within the limits of constitutional certainty.

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[123]A. 492-96. For discussion of the constitutional justification for ensuring effective communication, and hence access, to employees under the First Amendment, *see, infra,* Part VIII.

The State also attempts to cloud the District Court's conclusion that the compulsory arbitration portion of § 1393(B) denies Union due process. (Brief for the Appellants, at 42-43.) § 1393(B), one of several permitting summary relief, authorizes an employer to enjoin a strike for ten days if the employer agrees to submit the dispute to binding arbitration. The election of arbitration is unilaterally up to the employer; by its terms the provision does not allow the union to reject arbitration, nor does the statute permit a union to compel an employer to arbitrate.

The State does not argue precisely that § 1393(B) is uncertain; rather, it, incredibly, contends that a union "has no price to pay" (*Id.*, at 42) by the operation of § 1393(B). The "price" is the ability to strike, and if, as the state further asserts, "the effect of the restraining order is merely to bind the employer, not the union" (*Id.*, at 43), then the state implicitly acknowledges its certain impact.

For discussion of § 1393(B), *see, infra,* Part III.

[124]Brief for the Appellants, at 41.



The State's abstention argument as to the AERA's prohibition against "dishonest, untruthful and deceptive" consumer publicity[125] shows even more clearly the overwhelming predominance of purely constitutional issues. The State asks the Court to allow the Arizona courts the first opportunity to read into the Act the "knowing falsehood or reckless disregard" standard of *New York Times v. Sullivan,* 376 U.S. 254 (1964). In effect, it admits the statute's overbreadth and argues to defer the federal constitutional determination to the State. Without question, no state law issue is involved; the determination clearly falls within the proper jurisdiction of a federal court.

By its few hypotheticals raising fringe issues, the State skirts the inevitable confrontation between the AERA and the federal Constitution. It presents no state law issue obviously susceptible of a construction eliminating federal questions and capable of resolution in a single state proceeding to justify its assertion that the federal courts should abdicate their responsibility to decide the federal constitutional questions posed by this case.

### B. Abstention Would Result In Inordinate Delay, Expense, And Deprivation Of Constitutional Rights To Appellees.

Procedurally, abstention in this case would entail limitless cost to the UFW, its members and supporters in time

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[125]§ 1385(B)(8) prohibits conduct by a labor organization

> [t]o induct or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity.

and expense, not to mention the deprivation of rights occasioned by the chill of living under an unconstitutional law as challenges slowly move through the state process and back to the federal courts. The Court in *England v. Louisiana State Board of Medical Examiners, supra,* 375 U.S. 411, graphically described the process once abstention is ordered. Abstention would force the Union to bring a declaratory judgment action in state court or to engage in constitutionally protected action and wait for the AERB or private parties to seek enforcement against it, one or several sections of the Act at a time. At that point, the Union would be required to elect to submit or to reserve its federal constitutional claims.

By submitting and fully litigating its federal claims at the state level, the Union could obtain federal review only by discretionary writ of certiorari in this Court after pursuing its claims through AERB and/or state court proceedings and on up the state appellate ladder, an ultimate resort which the Court in *England* itself termed "an inadequate substitute for the initial District Court determination" of federal claims and a denial of the "benefit of a federal trial court's rule in constructing a record and making fact findings" on federal claims. *Id.,* 375 U.S. at 416. *England* nonetheless expressly holds that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then—whether or not he seeks direct review of the state decision in this Court—he has elected to forego his right to return to the District Court." *Id.,* 375 U.S. at 419. Retention of jurisdiction by the District Court under the *Pullman* doctrine is thereby lost.



If, on the other hand, the Union elects to reserve federal constitutional claims, it must inform the state courts of the federal claims so that the state statute may be construed "in light of" those claims. *Government & Civic Employees Organizing Committee, C.I.O. v. Windsor,* 353 U.S. 364, 366 (1957). The Union must state on the record that it is exposing its federal claims only to this limited extent and intends to return to the District Court to litigate the federal issues should the decision on state law turn out unfavorably to it. This Court, in *England,* described some of the problems:

> . . . while a plaintiff who unreservedly litigates his federal claims in the state courts may thereby elect to forego his own right to return to the District Court, he cannot impair the corresponding right of the defendant.
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> (375 U.S. at 422, n. 13.)

> The litigant denying the statute's applicability may be led not merely to state his federal constitutional claim but to argue it, for if he can persuade the state court that application of the statute to him would offend the Federal Constitution, he will ordinarily have persuaded it that the statute should not be construed as applicable to him. In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so; and even if such a decision is not explicit, a holding that the statute is applicable may arguably imply, in view of the constitutional objections to such a construction, that the court considers the constitutional challenge to be without merit.
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> (*Id.,* at 420-21.)

Thus, the litigant electing to reserve federal claims must proceed through the state courts with one arm tied behind his back, litigating state law questions while merely informing the court of federal questions casting light on the state law issues. In this case, where state law questions are at best hypothetical and federal constitutional questions on the face of the statute are the crux of the challenge, abstention amounts to proceeding through the state courts with *both* arms tied behind the litigant's back.[126]

Justice Douglas, concurring in *England,* cautioned additionally that application of the *Pullman* doctrine to the field of civil rights would place "[t]he whole weight of the *status quo* . . . on the side of delay and procrastination" (375 U.S. at 435), noting that individual litigants even in the normal abstention case have shuffled back and forth between federal and state courts for eight and ten year periods (*Id.,* at 425.) Even the majority termed the process full of "precedural traps" and pictured litigants "shunted" from federal to state courts. It is no small wonder that the Court has come recently to rely on state procedures for certification of federal questions, where such procedures exist, for application of the *Pullman* doctrine. Notably, Arizona lacks a certification procedure.

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[126]As one commentator aptly observed,

> The conclusion I would draw from all this is that Pullman abstention is not worth its costs. If some means of receiving state court input on unsettled issues of state law is deemed necessary, a certification procedure, under which a federal court that needs clarification of a state legal issue makes its inquiry directly to the supreme court of the state, seems vastly superior.

Field, *The Abstention Doctrine Today,* 125 U.Pa.L.Rev. 590, 605 (1977). Other commentators would abandon the doctrine altogether. Wright, *Federal Practice and Procedure,* Jurisdiction, § 4253, pp. 481-82.



Abstention in this case would cause a myriad of problems, for reservation of federal claims in the practical context of the challenge to the AERA again brings federal constitutional questions to the forefront. For example, the State, under the guise of abstention, asks this Court to allow state courts to imply the *Times Malice* standard into Section 1385(B)(8), conceding it to be a purely federal constitutional issue. The case might arise as have other AERA enforcement actions, with a store proprietor suing to restrain the content of primary boycott speech claimed to be untrue. Plaintiff store would argue that the speech was untrue and thereby violated the plain language of Section 1385(B)(8). Defending, the Union would be faced with an impossible choice. On the apparent strength of the argument that Section 1385(B)(8) offends the constitutional standard of *Times Malice* and in the hope of winning an immediate ruling approving the speech, the Union would be tempted to argue its federal claim. However, a loss of this claim would mean the instant inability to return to the federal court (which, up to that time, would have retained jurisdiction under *Pullman*). The Union would be forced to appeal through the state process on a record already containing adverse findings on a federal claim. On the other hand, reservation of the federal claim would require the Union to state the *Times Malice* standard but carefully refrain from arguing it, instead asserting firmly its intention to return to federal court. The Union's only possible non-constitutional argument then would be that the speech was in fact true, an issue irrelevant under the *Times Malice* standard and, as such, potentially undercutting reservation of its federal claim. Nothing, of

course, would prevent the plaintiff store from arguing its own constitutional view, or the state court from rendering a decision on the federal constitutional claim. If the Union loses in the state trial court, it again risks submission of the federal constitutional claim by filing an appeal, even if the appeal concerns the issue of truth of the contested speech. Meanwhile, the state court decision, reached in conjunction with the Union's urging not to decide constitutional questions, deters legitimate expression.

Adjudication of the AERA's access proscriptions is similarly problematic. A grower, seeking an injunction against entry by a union organizer onto his property for the purpose of visiting an employee who lives there in a company-owned house, would argue that the house is a "facility" under Section 1385(C) to which he need not "furnish" access. The grower would argue the broadest possible meaning for the term "facilities," contrary to the State and growers' position before this Court.[127] The Union, whose position in reality is that such a sweeping use of the term to prohibit clearly protected speech demonstrates the facial overbreadth of the section, would naturally be tempted to agree with the employer's broad reading of the term and to argue therein its unconstitutionality. To reserve its claims for federal court, however, the Union could merely state its overbreadth allegation. Then, it would be forced to argue the opposite, that "facilities" under state law narrowly does not include company-owned employee housing. Again, the prospect of appealing an incomplete position to which the Union does not adhere, reveals problems

[127]Brief for the Appellants, at 41.



inherent in abstention and acknowledged by the Court in *England*.

Even more difficult is reaching a final state determination under the AERA, whether federal claims are reserved or submitted. The AERA's procedural provisions create an inescapable morass of concurrent and sometimes conflicting jurisdiction of the Board and state courts. In 1973, in a suit filed by Safeway Stores against the UFW under the AERA, a state superior court held Section 1385(B)(7) unconstitutionally vague.[128] Shortly thereafter, the AERB, upon a charge filed by Safeway, proceeded against the UFW for the very same conduct, in part relying on Section 1385(B)(7)[129] and denying a UFW motion to dismiss based on the prior litigation of the same dispute.[130] To prevent this duplicate litigation, the UFW had to return to the state court for an injunction against the Board proceeding on the ground that the court had assumed jurisdiction and the matter was *res judicata*. The court held that the doctrine of concurrent jurisdiction prevented the Board from assuming jurisdiction over a dispute in which the court had already assumed "exclusive" jurisdiction.[131]

Then in 1975, the Board again proceeded against the Union under Section 1385(B)(7). The UFW, relying on the superior court determination, moved to dismiss on the basis of *stare decisis*. The administrative trial examiner denied the motion on the grounds that the Board had

[128]Enforcement Stipulation, at Item 2A; A. 80, 93-105.
[129]*Id.*, at Item 2F; A. 81-82.
[130]*Id.*; A. 163-68.
[131]*Id.*; A. 169-74.

primary jurisdiction and that the superior court determination was, therefore, not binding.[132] The administrative proceeding resulted in a decision in which the trial examiner, after having reserved jurisdiction to the Board, ruled that he did not have the "prerogative" to rule on constitutional questions in the administrative context.[133] On exceptions filed by the UFW, the Board, absolutely without explanation, not only held that it had no jurisdiction to consider the constitutional questions raised by Section 1385(B)(7), but "denied" that the superior court's determination in the Safeway case was *stare decisis*.[134] Ironically, under Section 1390(F), the state superior courts are charged with appellate review of the AERB's orders.

The AERA's procedural sections thus build a system of jurisdictional confusion. The Board may go to superior court for temporary restraint pending an unfair labor practice hearing;[135] it may also petition the superior court for enforcement of its orders;[136] and any person aggrieved may petition the superior court for review of Board orders.[137] In the case of enforcement or review, the superior court is empowered, in effect, to re-hear and re-decide the case by its liberal authority to consider additional evidence.[138] At the same time, any person aggrieved or injured in his business may sue for damages and injunctive

[132] *Id.*, at Item 11A; A. 85-86, 163-68.
[133] *Id.*, at Item 11C; A. 175-80.
[134] *Id.*, at Item 11D; A. 183-86.
[135] § 1390(J).
[136] § 1390(E).
[137] § 1390(F).
[138] § 1390(E).



relief for violation of any part of the Act.[139] This provision, quite plainly, authorizes duplicate litigation of any matter before the Board and the state courts.[140] In the actual enforcement of the Act, discussed above, this built-in double jeopardy, as it were, has resulted in rivalry as to which branch has exclusive jurisdiction, conflicting decisions, assumption of jurisdiction and then failure to exercise that jurisdiction on the merits, and refusal to apply well-settled legal doctrines designed to avoid duplicative and endless litigation without final result. If the Court abstains, it banishes the Appellees to a state labyrinth from which they, quite literally, may never emerge, whether they submit or reserve their federal claims.[141]

## III.

## THE AERA'S ENFORCEMENT PROVISIONS SANCTION THE ISSUANCE OF EX PARTE RESTRAINING ORDERS WITHOUT NOTICE IN THE AREA OF BASIC FREEDOMS GUARANTEED BY THE FIRST AMENDMENT AND MANDATE THE ISSUANCE OF AUTOMATIC RESTRAINTS ON STRIKES AND BOYCOTTS OR THREAT THEREOF WITHOUT PRIOR JUDICIAL HEARING IN VIOLATION OF THE FIRST AMENDMENT.

Sections 1393(A), 1393(B), and 1390(K) of the AERA all on their face provide for the issuance of restraining

[139] § 1393(A).
[140] Under federal labor law, duplicative jurisdiction is studiously prevented through the language of the LMRA, which allows suits only for violation of collective bargaining agreements [29 U.S.C. § 185] and for *damages* resulting from unlawful secondary boycott [29 U.S.C. § 187], and through the doctrines of preemption, exhaustion, and *res judicata*. § 1393(A) of the AERA consciously departs from the NLRA model and sets up a maze of inherently conflicting procedures for resolution of any dispute arising under the Act.
[141] "God helpe the man so wrapt in Errour's endlesse traine!" Edmund Spenser, *The Faerie Queene*, Book I, Canto I, ¶ XLIII, Dent & Dutton.

orders *ex parte* and without notice enjoining activities within the ambit of the First Amendment. Further, Section 1393(B) mandates an automatic restraining order against any strike, boycott, or threat of a strike or boycott. These enforcement provisions disregard the protections of First Amendment activities required by the Constitution.

**A. Injunctions Issued Ex Parte And Without Notice.**

Section 1393 in two separate subsections provides for restraining orders to issue pursuant to Rule 65 of the Arizona Rules of Civil Procedure, which does not require a party to notify an opposing party prior to obtaining temporary relief.[142] Arizona courts have affirmed that Rule 65 authorizes issuance of restraining orders without notice or prior hearing. *Nu-Tred Tire Company, Inc. v. Dunlop Tire and Rubber Corporation,* 118 Ariz. 417, 577 P.2d 268, 270 (1978). Arizona courts have on two occasions issued *ex parte* restraining orders against the UFW under Section 1393(A), and in both cases the orders issued without notice.[143]

In addition, Section 1390(K) authorizes the Board to obtain restraining orders without notice upon a petition alleging "that substantial and irreparable injury to the charging party will be unavoidable." The Board has obtained a restraining order against boycott activity by the UFW under this section, again without notice.[144]

*Ex parte* orders restraining activities of First Amendment concern are unconstitutional where issued without

[142]See Appendix "A", Rule 65(d).

[143]Enforcement Stipulation, at Items 7, 13; A. 84, 88.

[144]Enforcement Stipulation, at Item 12; A. 87.



notice, where there is no showing that it is impossible to serve or notify opposing parties and give them an opportunity to participate. *Carroll v. President and Commissioners of Princess Anne, supra,* 393 U.S. at 180. Notice is essential to allow participation of the opposing party in order to insure the careful judgment which must be exercised in any decision to restrain First Amendment activities and to tailor narrowly any such restraint. *Carroll; see also, United Farm Workers v. Superior Court,* 14 Cal.3d 902, 908-910, 122 Cal.Rptr. 877, 537 P.2d 1237 (1975). Section 1393 is not saved from this infirmity by Rule 65's provision for dissolution or modification of the restraining order on motion of the opposing party with two days' notice; a virtually identical provision was considered by this Court in *Carroll* and rejected because of the inherent inadequacy of such after-the-fact procedures. *Id.,* 393 U.S. at 184.

**B. The Sweeping Nature Of The Automatic Prior Restraint Authorized By Section 1393(B).**

Section 1393(B) requires the courts of Arizona to issue a ten-day restraining order upon the filing of a proper application by an agricultural employer.[145] The only issue before the court prior to issuing the restraining order is whether or not the verified petition contains the necessary allegations. "Proper application" includes only an allegation that the employees are unlawfully conducting a strike

[145]The statute reads, in pertinent part:

> In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application *shall* grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott . . . (emphasis added).

or a boycott or are unlawfully threatening to strike or boycott, and an allegation that the cessation of work or conduct of a boycott will result in the prevention of production or loss, or reduction in grade, quality, or marketability of an agricultural commodity for human consumption in commercial quantities.[146] If a strike is to be enjoined, an agricultural employer's petition must also include the employer's agreement to submit the dispute to binding arbitration.

Section 1393(B) allows no inquiry as to the objectives or the nature of the activities to be enjoined prior to the issuance of the relief.[147] In short, the statute mandates an automatic prohibition of First Amendment activity without a prior judicial hearing upon the validity of the grower's charges or a determination that the strike and/or boycott are in fact unlawful.[148]

This Court applies a heavy presumption against the constitutional validity of a system of prior restraints on expression. *Near v. Minnesota,* 283 U.S. 697 (1931); *Thomas v. Collins,* 323 U.S. 516 (1945); *Freedom v. Maryland,* 380 U.S. 51 (1965); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969). The activities regulated by

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[146]The statute equates "commercial quantities" with a market value of $5000 or more.

[147]The only discretion allowed to the court is that it "may" grant injunctive relief even where there is no "proper application".

[148]

> "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, supra,* 413 U.S. at 391.



Section 1393(B) come well within the ambit of First Amendment freedoms. Peaceful picketing, handbilling, and oral conversation are important means of communication, and as such, come within the First Amendment's guarantees of freedom of expression and assembly, fundamental liberties which extend to the States. *Thornhill v. Alabama, supra,* 310 U.S. 88; *Carlson v. California,* 310 U.S. 106 (1940); *A.F.L. v. Swing,* 312 U.S. 321 (1941). Boycott activities necessarily entail First Amendment concerns, as they inherently involve direct communication and speech by means of oral conversation, handbilling, newspaper advertisement, and peaceful picketing. Indeed, considered together, these fundamental activities of the boycott, picketing and the strike comprise the totality of a union's means of communicating the facts of a labor dispute to the public.

To be sure, conduct which combines speech and non-speech elements may be regulated by the State where the restrictions imposed are reasonably calculated and narrowly tailored to further substantial governmental interests. *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968). However, where the government can further its interest by a lesser restraint on individual liberty at little or no added inconvenience, it must do so. *Shelton v. Tucker,* 364 U.S. 479 (1960); *United States v. Robel,* 389 U.S. 258, 267-68 (1967). Section 1393(B)'s sweeping restraint of strikes and boycotts, without any prior judicial determination of the objectives or the manner in which they are conducted, goes far beyond any legitimate interest of the State, and unconstitutionally infringes employee and union rights.

The various unfair labor practice provisions of the AERA which define "unlawful" strikes and boycotts are

discussed in separate sections of this Brief,[149] and in each case broadly restrict First Amendment activities. Section 1393(B) carries the constitutional infirmities of these sections a giant step further, granting an employer an automatic restraining order upon the mere allegation that a strike or boycott comes within one of these broad prohibitions. For example, an employer could allege that the oral conversation of a union supporter tended to induce or encourage a management employee to decide not to distribute a commodity, and on that basis enjoin a boycott. An employer could allege in its application for a restraining order that a strike was unlawful because it had not been properly authorized by a vote of a majority of the employees in the bargaining unit, as required by Section 1385(B)(13). Under Section 1393(B), this allegation would require the court to enjoin the strike, without permitting any inquiry into the validity of the allegation.[150] Similarly, an employer could allege that a union negotiator at the bargaining table had threatened to strike or boycott over a proposal possibly impinging on management rights, in violation of Section 1385(B)(11). Again, such an allegation entitles the employer to injunctive relief of a strike

[149]See Parts IV, V, VI, *infra*.

[150]Examination of § 1385(B)(13) reveals that it could be used to support an allegation of an unlawful strike in the case of literally every strike. The section specifically requires that the vote be by "secret ballot", and provides that voter eligibility be based on the bargaining unit, which under §§ 1382(1) and 1389(B) consists only of employees who worked for the employer in the previous year. These requirements leave room for an employer to allege a violation of the regulation, for purposes of obtaining a restraining order, in every case.



or boycott, without any inquiry into the union's actual bargaining table conduct.[151]

The impermissible feature of Section 1393(B) is the mandatory issuance of restraining orders obtained *ex parte* and without notice affecting the exercise of unquestionable First Amendment rights. Such a total and unqualified restraint on free expression has consistently been repudiated. *Thornhill v. Alabama, supra,* 310 U.S. 88; *Edwards v. South Carolina,* 372 U.S. 229 (1963).[152] The sweeping and automatic restraint authorized by the statute in every case is not narrowly tailored to any legitimate state interest.

The provision for binding arbitration of disputes contained in Section 1393(B) in no way relieves the statute's infirmities.[153] Section 1393(B) eliminates any effectiveness

[151]Another unfair labor practice section of the Act, not discussed elsewhere in this Brief, bears consideration in connection with § 1393(B). § 1385(B)(10) provides that it is an unfair labor practice for a union or its agents "to threaten or engage in arson, libel, slander, injury to person or property or other violent conduct when the objective is to prevent the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural product." In prohibiting, *inter alia*, threats to engage in libel or slander, the statute provides a broad basis for employer allegations of unlawfulness based upon oral conversation. Thus, an employer could obtain a restraining order enjoining a boycott based upon an allegation that the union had threatened libel or slander, without any prior judicial determination of the validity of the allegations.

[152]See also, *Davis v. Francois,* 395 F.2d 730 (5th Cir., 1968); *Machesky v. Bizzell,* 414 F.2d 283 (5th Cir., 1969).

[153]The three judge court below on its own motion found the binding arbitration provision of § 1393(B) violative of substantive due process and the Seventh Amendment. The statute's facial invalidity on First Amendment grounds obviates these other concerns.

As this Court has recognized, a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial

of a union's strike or boycott, without promoting peaceful accommodation of disputes between labor and management. Binding arbitration under Section 1393(B) may be invoked only by an employer, who can utilize it when desired. The employer is free to attempt to withstand the union economic pressure or to break a strike by hiring non-union workers, and if the strike or boycott threatens to be successful, he can resort to the Act to end the strike by agreeing to arbitrate. The employer is free to lockout his employees, creating as much disruption of production as the most effective of strikes, and the union has no means of compelling arbitration of the dispute.[154]

Further, the employer may invoke the restraint against a boycott without submitting to arbitration. The statute explicitly requires agreement to arbitration only where a strike is to be enjoined:

> If an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order *to enjoin a strike* as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. (Section 1393(B); emphasis added).

Thus, the automatic restraining order is available against the wide range of free speech activities inherent in a boycott, without any provision for alternative resolution of the dispute.

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court. *Dandridge v. Williams*, 397 U.S. 471, 476 (1970). Throughout these proceedings, Appellees have urged the invalidity of Section 1393(B) on First Amendment grounds.

[154]In addition, even in the event of a strike, the employer need not submit to arbitration if the restraining order is sought by a person other than the employer.



In addition, an employer with less than six employees may, under Section 1382(2), operate in complete freedom from any regulation under the AERA, yet has the option to elect to be an "agricultural employer" and obtain the automatic restraining order of Section 1393(B) at any time. In short, the statute is nothing more than a weapon given to employers to entirely prevent strikes and boycotts, with no relation to any legitimate state interest. As a prior restraint of activities within the ambit of First Amendment protections, the statute's provision for automatic across-the-board restraining orders is invalid.

## IV.

## SECTION 1385(B)(8) IMPOSES IMPERMISSIBLE CENSORSHIP ON ALL CONSUMER-DIRECTED SPEECH AND BANS WORKER COMMUNICATIONS ON ISSUES OF INDUSTRY-WIDE CONCERNS IN VIOLATION OF THE FIRST AMENDMENT.

At least since *Thornhill v. Alabama, supra*, 310 U.S. 88, First Amendment protections operate indisputably in the labor relations setting:

> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. [Citations.] . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations such as are challenged here, infringing upon the right of employees effectively to inform the

> public of the facts of a labor dispute are part of this larger problem. . . . "Members of a union might, without special statutory authorization by a State, make known facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (*Id.*, 310 U.S. at 102-03.)

Section 1385(B)(8), one of several provisions proscribing union consumer boycott activities,[155] blatantly infringes farmworkers' First Amendment speech rights recognized in *Thornhill*. This section defines as unlawful a labor union's or its members' conduct "induc[ing] or encourag[ing] the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural products by the use of *dishonest, untruthful* and *deceptive* publicity." [Emphasis added.] In addition to imposing a truth requirement on boycott speech, Section 1385(B)(8) limits permissible inducements to identifiable agricultural products produced by an employer "with whom the labor organization has a primary dispute." An agricultural employer who markets his product under a "trademark, trade name or generic name which would include agricultural products of another producer or user of such trademark, trade name or generic name" shields himself from any publicity directed to the consumer.

[155]The AERA regulates union boycott activities through numerous provisions, including § 1385(B)(6), § (B)(7) [*see*, Part V, *infra*], § (B)(8), and § (B)(12) [*see*, Part VI, *infra*]. Arizona's legitimate restriction of secondary boycott activity—i.e., activity directed at the *employees* of a secondary employer—is amply encompassed in § 1385(B)(6), which incorporates Arizona's existing secondary boycott restrictions in § 1321, set forth in Appendix C. The other boycott restrictions represent an obvious excursion beyond the restrictions of § 1321 to impose upon farmworkers restrictions deemed unnecessary for the rest of Arizona labor.



The District Court, in a detailed examination of Section 1385(B)(8), found it "invalid on its face." A. 492. This Section broadly restricts a labor organization's communications directed to the consuming public, whether by oral conversations, picketing, handbilling, or media communication to encourage a boycott of the struck product. Two fatal constitutional infirmities readily appear.

**A. Unconstitutional Censorship.**

The first infirmity is Section 1385(B)(8)'s mandate that all but "truthful, honest and nondeceptive" publicity to the consumer subjects a labor organization to summary prior restraint and criminal penalties.[156] For example, this Section would make unlawful and enjoinable union representations that:

> (1) An employer had the poorest working conditions in the state when the AERB or a superior court might decide that there were some worse.
>
> (2) An onion ranch employed child labor in its fields when in fact the legal employer was a labor contractor the ranch had retained to harvest its onions.

Section 1385(B)(8) also restricts expressions of opinion like "Unfair to Labor", hyperbole like "There's blood on those grapes", and other graphic language historically coloring this country's labor disputes. *See, Letter Carriers v. Austin*, 418 U.S. 264 (1974).

This Court traditionally invalidates such restrictions and regulations on speech not to encourage falsehoods, but to protect robust debate and to prevent government from

[156]§§ 1390(K); 1393(A) and (B).

assuming the robe of the censor. As employers and workers argue their respective cases to the public, the courts and the Board would be handed the overwhelmingly burdensome—if not impossible—task of establishing the accuracy of some claims while censoring others. The fact is that the First Amendment has always protected more than purely "true" speech. If it is made a crime to tell falsehoods, as this Act does, the speaking of truth is restricted as well.

In *Organization For A Better Austin v. Keefe, supra,* 402 U.S. 415, this Court reaffirmed this principle. In *Keefe,* a group protesting a realtor's "blockbusting" tactics distributed handbills exposing his practices. The realtor, contesting the "blockbusting" charge, obtained a court injunction against further leafletting. The injunction was invalidated, with the following pertinent language of Chief Justice Burger applicable here:

> It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota,* 283 U.S. 697, the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. (402 U.S. at 418.)

In *N.Y. Times v. Sullivan, supra,* 376 U.S. 254, this Court rejected any claim that First Amendment protections apply only to truthful statements:

> Authoritative interpretations of the First Amendment guarantees have *consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—*



> and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall,* 357 U.S. 513, 525-26, 2 L.Ed.2d 1460, 1472. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N.A.A.C.P. v. Button,* 371 U.S. 415, 445, 9 L.Ed.2d 405, 425.
>
> • • •
>
> That erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need to survive" [citations] was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson* . . . . (376 U.S. at 271-72; emphasis added.)

A requirement which protects only truthful statements "dampens the vigor and limits the variety of public debate" and "is inconsistent with the First and Fourteenth Amendments." *Id.,* 376 U.S. at 279. Under a provision like Section 1385(B)(8), therefore, persons are frightened into not speaking at all for fear of making a statement that is not exactly accurate or one they are not prepared to prove in court. Some unknown fact could make their statements untrue and subject them to criminal prosecution. Under such a provision the safest course, but by no means the constitutional course, would be to say nothing.[157]

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[157]The State's analogy (Brief for the Appellants, at 62) of § 1385(B)(8) to § 8(b)(4)(ii)(B) of the NLRA (29 U.S.C. § 158(b)(4)(ii)(B)) requires little comment; the constitutional dimensions of the two provisions are entirely different. The proviso to § 8(b)(4) is *not* a prohibitory section, but strongly affirms conduct which is not, and constitutionally could not be, within the restrictive clauses of § 8(b)(4). The proviso *guarantees* protection for numerous means of union publicity and was, in fact, inserted as a safeguard of speech rights in labor disputes. *N.L.R.B. v. Fruit and Vegetable Packers [Tree Fruits],* 377 U.S. 58 (1964). No

The State does not seriously defend Section 1385(B)(8)'s imposition of a truth requirement on consumer-directed speech, suggesting instead the federal judiciary await state court determination of whether the *Times Malice* test limits the application of Section 1385(B)(8).[158] Not only does this position implicitly concede the overbreadth of Section 1385(B)(8), but it forces the Union and its members to act under the overhanging spectre of the State's application of an admittedly unconstitutional law.

The District Court recognized the error in the State's contention and correctly found Section 1385(B)(8) invalid. *See, Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y., 1975), *aff'd. without opin.*, 423 U.S. 1041 (1976). In *Vanasco*, the State of New York argued, just as the State and the growers do now, that the state courts should be given the opportunity to engraft the *Times Malice* limitation onto a statute which, on its face, incorporates no such limitation. However, the three-judge panel in *Vanasco* refused this suggestion, indicating "[n]o limiting construction has been applied to these sections and we cannot do so." *Id.*, 401 F.Supp. at 96-97. On similar reasoning, the District Court properly invalidated Section 1385(B)(8) by finding:

> The Court in *Vanasco* held that a statute prohibiting "deliberate misrepresentations" and regulations pro-

similar safeguards appear in the boycott provisions of the AERA. *See*, §§ 1385(B)(6)—(B)(10). Further, the word "truthfully" in § 8(b)(4) applies only to identification of the employer with whom the dispute exists—not to the content of publicity regarding the substance of the dispute. Contrary to Appellants' claim, *Tree Fruits* did not address the question of a truthfulness requirement in communication with consumers; the issue in *Tree Fruits* was whether the NLRA permits picketing to ask consumers not to buy a particular product.

[158]Brief for the Appellants, at 40, 63.



> hibiting "misrepresentations" in political campaigns, which on the face of the statute were not based on a finding of actual malice, was an overbroad infringement of First Amendment rights and was unconstitutional on its face.
>
> The statute here involved likewise contains no intent requirement and in fact is even broader since it is not limited to "deliberate misrepresentations". (A. 490.)

The State urges that the District Court incorrectly found the enforcement of Section 1385(B)(8) involved issues of prior restraint. Brief for the Appellant, at 60-61. Both the language of the Act and its enforcement expose the error in this contention. Provisions of the AERA provide for cease and desist orders or injunctions against all "unfair labor practices" including those like Section 1385(B)(8) designed to restrict boycott speech activity. Sections 1390(K) and 1393(A) permit the Board or any aggrieved party to obtain summary injunctive relief from a superior court without notice to stop boycott and strike activity. Both procedures have been utilized against the United Farm Workers to obtain such TRO's which acted as prior restraints on the Union's consumer-directed activities.[159] The Board issued, pursuant to Section 1390(C),

[159]*E.g.*, Enforcement Stipulation, Items 12, 13; A. 87-88. In *Agricultural Employment Relations Board v. United Farm Workers of America*, Pima County No. 153789, the Board obtained a TRO without notice which stated:

> IT IS ORDERED that Defendant United Farm Workers of America, its officers, agents, servants, employees and representatives and all persons in active concert or participation with them are hereby until further order of this Court, restrained and enjoined from:
>
> • • •
>
> B. Attempting to induce, encourage, restrain, coerce or otherwise interfere with executives or management of the aforementioned stores to make management decisions not to handle,

cease and desist orders against speech on allegations of unfair labor practices by the UFW.[160] The same procedure was utilized against the United Farm Workers to obtain summary injunctive relief in actions alleging Section 1385 (B)(8) as well as the other boycott regulations.[161]

The "truth" and "non-deceptive" requirements for consumer-directed publicity imposed by Section 1385(B)(8) exceed constitutional limitations. They invite, and require, inquiry into every aspect of union publicity to scrutinize the factual validity of the smallest claim of fact or opinion. Such review and regulation of speech is wholly inappropriate in any area of free speech and, particularly, in labor relations, where "uninhibited, robust and wide open" debate has been encouraged and found essential. *Cf., Letter Carriers v. Austin, supra,* 418 U.S. at 273.

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sell or distribute Gallo Brand products in violation of A.R.S. 23-1385(B)(7).

This is the TRO stipulated to by the parties in Item 12 of the Enforcement Stipulation. The entire TRO, not made part of the record, is attached hereto as Appendix D.

[160]Enforcement Stipulation, Item 11, Exhibit 11D; A. 85, 180:

Respondent, United Farm Workers of America, AFL-CIO, its officers, agents and representatives shall:

Cease and desist from picketing and urging *customers* and prospective customers not to shop at Roy's Arizona Pharmacy, Pueblo Liquor Stores, Market Spot and Super City Department Stores.

Cease and desist from inducing, encouraging, restraining and coercing *executives and management personnel* of Roy's Arizona Pharmacy, Pueblo Liquor Store, Market Spot and Super City Department Stores not to handle, sell or distribute Gallo wine. (Emphasis added.)

[161]Enforcement Stipulation, Items 7, 13; A. 84, 88.



**B. Unconstitutional Limitations On The Scope Of Speech.**

The second infirmity of Section 1385(B)(8) limits permissible inducements to circumstances involving a primary dispute; a union can induce or encourage consumers not to buy products only if produced "by an agricultural employer with whom the union has a primary dispute." This means that a labor organization may utilize the consumer boycott against an employer *only if* his own employees have a controversy over terms or conditions of employment at that ranch.

Such a limitation is impermissible. This Court, faced with the identical question in *A.F.L. v. Swing, supra,* 312 U.S. 321, struck down legislative efforts to silence speech relating to industry-wide concerns on the basis that because the "interdependence of all in the same industry has become commonplace," the state cannot exclude workers from exercising free communication "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." *Id.*, 312 U.S. at 326. *Swing* held the First Amendment could not tolerate barriers to worker communications, even if the workers were not currently employed by the employer to whom the communications pertained, if they found the facts of the dispute relevant to their interests.

The rationale of *Swing* remains valid (*see, Virginia State Board of Pharmacy v. Virginia Citizens' Council,* 425 U.S. 748, 762-63), and Section 1385(B)(8)'s attempt to ban handbills and oral conversations, as well as picketing, related

to other employers in an industry who may be acting adversely to interests of workers in that industry cannot stand.

Section 1385(B)(8) then attempts even further inroads on communications that may have industry-wide or area-wide significance by prohibiting publicity directed at a trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name. Thus, the Union can not ask consumers to boycott "non-union" grapes even if *all* of the grape industry was non-union.[162] It is obvious, however, that Arizona grape workers could very well "deem . . . relevant to their interests" (*A.F.L. v. Swing, supra,* 312 U.S. at 326), the posture of every grape grower in the state toward unionization and would wish to communicate their concerns to the public even though some of those growers may not have an immediate controversy with their employees.

In many instances this provision would also ban the purest form of primary product boycott. Under its terms the UFW could not have undertaken its national boycott of Gallo wine. Even though the hundreds of Gallo employees who worked in Gallo's vineyards did have an immediate dispute with the Gallo company, most wines sold under the Gallo trademark also contain grapes Gallo purchases from small neighboring vineyards with some of whom

[162]This is another conscious departure from analogous NLRA provisions, presumably to avoid this Court's decision in *Tree Fruits, supra,* 377 U.S. 58, upholding product boycotts directed at the generic name of an agricultural commodity, Washington State apples, even though not all Washington State apple growers were involved in the labor dispute.



there was no dispute. Thus, consumers could not have been asked to boycott "Gallo" wines.[163]

This restriction of Section 1385(B)(8) insulates agricultural employers who are members of associations which market under trademarks, trade names or common label, or who enter into various business arrangements to grow crops with other agricultural employers. Such association and business arrangements are common in agriculture. *See, e.g.,* Herman and Zenor, *Land Transactions in California Agriculture,* 53 *Calif. St. Bar J.,* 48 (1978); Zerger, *The NLRA Agriculture Exemption—A Mechanical or Functional Approach,* II *Ind. Rel. L.J.,* 131 (1977).

**C. Summary.**

The invalidity of Section 1385(B)(8) is apparent. The substance of the Section enacts restrictions invariably rejected by this Court as inimical to free debate. Compounding these defects, the procedures enforcing Section 1385 (B)(8) provide for the issuance of *ex parte* temporary restraining orders which, in design and application, allow prior restraint of speech activities. Such restraint is, of course, constitutionally impermissible in an area affecting

[163]By prohibiting publicity directed at a product's generic name rather than its brand name, § 1385(B)(8) places an insurmountable burden on unions to identify products by employer. Agricultural goods are usually removed from their shipping cartons before being placed onto retailers' shelves. The same retailer frequently carries a different producer's produce each day, depending upon availability. However, unless the secondary employer volunteers the information or permits inspection in the backroom, it is virtually impossible to identfy every head of lettuce or bunch of grapes by producer. Even though the union may have a dispute with every supplier of the retailer, or even though the union may know that each is non-union, it cannot merely ask consumers to stop buying "non-union" products without determining which grower's produce is on the shelf that day.

First Amendment freedoms. *Carroll v. President and Commissioners of Princess Anne County, supra,* 393 U.S. 175; *Near v. Minnesota, supra,* 283 U.S. 697.

## V.

## SECTION 1385(B)(7) FORBIDS COMMUNICATIONS BETWEEN LABOR UNIONS AND MEMBERS OF THE PUBLIC IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

Ignoring the constitutional right to inform the public of the facts of a labor dispute (*Thornhill v. Alabama, supra,* 310 U.S. 88), the AERA imposes an absolute ban on a labor union's communication to members of the public for whom such communications are most vital and to whom they would be most effective. Section 1385(B)(7) prohibits *inducing* or *encouraging,* as well as threatening, restraining, and coercing management personnel to make a decision not to handle products of an agricultural employer with whom a labor dispute exists.[164] Incorporating no distinction between pure verbal speech and expressive conduct, this Section prohibits all oral conversations, written communications, and picketing which might induce or encourage retail support for a product boycott. The breadth of this ban extends not only to communications directed at management personnel, but also includes speech aimed at

[164]This Court has interpreted the NLRA to permit appeals to secondary employers to make "managerial decisions" to join a product boycott. *N.L.R.B. v. Servette,* 377 U.S. 46 (1964). That § 1385(B)(7) specifically prohibits inducing a "management decision" to cease handling any product, reflects yet another conscious choice by the AERA framers to go well beyond the NLRA's proscription of union speech activities.



consumers which might indirectly influence a management decision not to stock a product.

Common types of constitutionally-protected speech caught within the net of Section 1385(B)(7) include:

(1) Informing the public orally, by newspaper, radio or leaflet, that union contracts restrict or prohibit the use of pesticides, and urging a boycott of non-union products because of the danger of pesticide contamination.

(2) Verbally requesting the public to buy only union-label agricultural products in support of union efforts to outlaw child labor, control pesticide use, require toilets in the fields, increase safety precautions, or otherwise improve the working and living conditions of farmworkers through collective bargaining agreements.

(3) Oral discussions with market managers about the hazards of pesticide poisoning from non-union products, and suggestions that the market not offer such produce for consumption.

(4) General appeals to the public through advertisements, leaflets, television interviews, and news reports, urging support for farmworkers' efforts to unionize by buying only union-label products.

(5) Requesting store customers to ask management personnel for support of farmworkers' rights to organize by stocking union label goods and temporarily refraining from carrying certain non-union products.[165]

[165]These examples are not arbitrarily chosen unconstitutional interpretations speculating on the broadest application of § 1385(B)(7). They come within the ambit of enforcement attempts by the AERB and its General Counsel. *See, e.g.,* Enforcement Stipulation, Items 11, 12, Exhibit 11D; A. 85-87, 180. *See, also,* temporary restraining order discussed in fn. 159, *supra.*

Any of these speech activities, all of which involve either pure oral or written communications, could ultimately "induce or encourage" management personnel to stop selling a product and hence are swept under the prohibition of Section 1385(B)(7). Such communications with the public are, under the Act, not only unfair labor practices subject to *ex parte* restraint without notice, but also *crimes* punishable by fine or imprisonment. In broadly prohibiting all forms of expression which could ultimately "induce or encourage" management personnel to stop selling a product, Section 1385(B)(7) sweeps far beyond whatever legitimate interest the State may have in protecting neutral employers from coercive conduct, and imposes a blanket censorship of speech that strikes at the heart of the First Amendment. *Thomas v. Collins, supra,* 323 U.S. at 534-36; *Thornhill v. Alabama, supra,* 310 U.S. at 104-05; *Carlson v. California, supra,* 310 U.S. at 112.

**A. Unions And The Public—Both Management Personnel And Consumers—Have A Vital Interest In The Vigorous Exercise Of Free Speech Rights During A Labor Dispute.**

Section 1385(B)(7) infringes two fundamental rights: the right of a union and its supporters to publicize the facts of a labor dispute and the right of the public to receive such communications.

Communication with the public and other workers is often a primary objective and major strength of modern labor unions (*Thornhill v. Alabama, supra,* 310 U.S. at 103-04; *A.F.L. v. Swing, supra,* 312 U.S. at 325-26), with



free discussion of labor-management issues constitutionally guaranteed:

> [P]ublicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within the liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state. (*Carlson v. California, supra,* 310 U.S. at 113.)

Exposing substandard working and living conditions, unbridled use of pesticides, child labor law violations, the causes of farm labor disputes, and efforts through organization and collective bargaining to resolve those disputes and improve conditions is vital to farmworkers and "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama, supra* 310 U.S. at 103.[166]

*Effective* communication of such information is equally vital and constitutionally protected. Although certain restrictions on speech activities of labor disputants may be imposed, the state may not

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[166]That the interests of the contestants in a labor dispute are economic as well as informational and ideological is irrelevant to First Amendment protection.

> [I]t has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome. [Citations omitted.] We know of no requirement that, in order to avail themselves of First Amendment protection, the parties to a labor dispute need address themselves to the merits of unionism in general or to any subject beyond their immediate dispute. (*Virginia St. Bd. of Pharmacy v. Virginia Citizens' Consumer Council, supra,* 425 U.S. at 762.)

> ...impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgement of freedom of speech and of the press concerning almost every matter of importance to society. (*Thornhill v. Alabama, supra,* 310 U.S. at 104.)

*See also, Thomas v. Collins, supra,* 323 U.S. 516; *A.F.L. v. Swing, supra,* 312 U.S. 321. Thus, farmworkers retain both the right to speak at the retail site, often the only effective place to publicize a farm labor dispute located in fields hundreds of miles away, and the right to communicate with consumers and management personnel, those members of the public who can most effectively respond to farmworkers' appeals for support.[167]

Commensurate with a union's right to speak out on labor issues is the public's right to hear such speech. *Virginia St. Bd. of Pharmacy v. Virginia Citizens' Consumer Council, supra,* 425 U.S. at 756-57. Of all segments of the public, retail management personnel have perhaps the greatest interest in receiving information about a particular product they may or may not stock.

A manager may freely exercise independent discretion as to whom he will deal with or which products he will market, including "reasons sufficient [only] to himself." *F.T.C. v. Raymond Bros.,* 263 U.S. 565, 573 (1924). *See also, U.S. v. Bausch & Lomb,* 321 U.S. 707, at 729 (1944). A management decision not to sell a product may be based upon the fact that it does not carry the "Good Housekeeping" seal, that it is likely to be contaminated with

[167]*See, e.g., Fortenbury v. Superior Court,* 16 Cal.2d 405, 106 P.2d 411 (1940); *Goldfinger v. Feintuch,* 11 N.E.2d 910, 276 N.Y. 281 (1937); *Galler v. Slurzberg,* 27 N.J. Super. 139, 99 A.2d 164 (1953).



pesticides, or that it was harvested by children. Intelligent exercise of this management discretion is incompatable with a ban on all communication between a union and management personnel which might "induce or encourage" a decision to stop handling a product.

### B. Section 23-1385(B)(7) Closes All Channels Of Communication, From Pure Oral Speech To Expressive Conduct.

By imposing a ban on *all* inducement or encouragement which might lead to retail support for a product boycott,[168] Section 1385(B)(7) prohibits virtually all communication between a union and the public (including retail management personnel) about labor disputes.

"Inducement or encouragement" of a retailer would be established by a union supporter visiting with the retailer and explaining the labor dispute, politely urging that certain products be temporarily removed from the shelves. It would include person-to-person oral conversations with con-

[168]In its substance, the language of § 1385(B)(7) is very similar to the original House revision of NLRA § 8(b)(4) (29 U.S.C. § 158(b)(4)). That language was ultimately rejected by the Conference Committee because of its First Amendment implications. As Sen. Kennedy and Rep. Thompson pointed out:

> The prohibition [of the House bill] reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
> • • •
> [O]ne of the apparent purposes of the amendment is to prevent unions from appealing to the general public as consumers for assistance in a labor dispute. This is a basic infringement upon freedom of expression. (105 Cong. Rec. 16591, II *Leg. Hist. of the LMRDA* 1708.)

As this Court noted in *Tree Fruits, supra,* "[t]his analysis was the first step in the development of the publicity proviso" of Section 8(b)(4)(ii)(B), safeguarding "the right of unions to appeal to the public, even by some conduct which might be 'coercive.'" 377 U.S. at 69.

sumers, asking that they request management personnel to stop selling a product or that the consumers themselves stop purchasing that product. It is difficult to imagine more "pure" speech under the First Amendment than words uttered between interested groups of citizens: unions, consumers, and management personnel. Such broad bans on oral communication have been repeatedly held unconstitutional. *Schneider v. New Jersey,* 308 U.S. 147 (1939); *Thornhill v. Alabama, supra,* 310 U.S. 88; *Carlson v. California, supra,* 310 U.S. 106; *Ex Parte Blaney,* 30 Cal. 2d 643, 184 P.2d 892 (1947).

Unlawful "inducement or encouragement" under Section 1385(B)(7) would also include leaflets passed out to consumers requesting that they stop buying products or newspaper ads to the same effect. It would include distribution of literature, circulation of petitions, publication of articles, and much other union activity publicizing, in written form, the facts of labor disputes. This provision would be violated if a union or its supporters publicized a labor dispute by radio or newspaper, and that publicity indirectly persuaded a management person to stop doing business with the agricultural grower involved in that dispute. However, the written word, including leaflets, has always been accorded protection by the First Amendment. *Organization For A Better Austin v. Keefe, supra,* 402 U.S. at 419; *Schneider v. New Jersey, supra,* 308 U.S. 147; *Lovell v. City of Griffin,* 303 U.S. 444 (1938); *Talley v. California,* 362 U.S. 60 (1960); *Branzburg v. Hayes,* 408 U.S. 665 (1972). This protection has been extended to include written communication of the facts of a labor dispute (*Thornhill v. Alabama, supra,*



310 U.S. at 101; *Carlson v. California, supra,* 310 U.S. at 112-13), and includes even leaflets which have a "coercive impact":[169]

> This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. (*Keefe, supra,* 402 U.S. at 419.)

In Section 1385(B)(7), Arizona bans verbal and written speech which "induces" or "encourages" as well as that which "coerces." If the State cannot constitutionally prohibit the latter, it surely cannot prohibit the former.

Finally, Section 1385(B)(7) bans all picketing which might induce a management decision to stop handling the product of an agricultural grower embroiled in a labor dispute. This ban would include not only picketing aimed at the retailer, but also picketing directed only to consumers asking that they boycott a product,[170] or mere informational

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[169]In *Tree Fruits, supra,* 377 U.S. 58, this Court held that the NLRA could not be interpreted to exclude leafleting which encourages consumers not to patronize a retail store.

[170]This Court has recognized a constitutional right to engage in product picketing. *Bakery & Pastry Drivers v. Wohl,* 315 U.S. 769 (1942). In *Tree Fruits, supra,* 377 U.S. 58, this Court held that the NLRA Publicity Proviso to § 8(b)(4) could not be interpreted to exclude peaceful picketing advising the public not to buy certain products. Although a narrow statutory construction avoided resting the decision on constitutional grounds, a traditional technique, this Court made clear that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment," (*Id.,* 377 U.S. at 63), and acknowledged that Congress felt a prohibition of this type of consumer picketing would be unconstitutional (*Id.,* 377 U.S. at 69). *See also,* II *Leg. Hist. of LMRDA* 1708. Mr. Justice Black, concurring in the result of *Tree Fruits,* thought Congress intended

picketing to expose pesticide contamination or mobilize public support (other than for a boycott). Such a blanket proscription of all picketing to help publicize a labor dispute is unconstitutionally impermissible. *Thornhill v. Alabama, supra,* 310 U.S. 88; *A.F.L. v. Swing, supra,* 312 U.S. 321; *I.B.T., Local 695 v. Vogt,* 354 U.S. 284, 294-95 (1957).[171]

### C. No Compelling State Interest Justifies Such a Broad Encroachment Upon The Fundamental Right Of Free Speech.

Regulation of pure speech and expressive conduct may be imposed by the State only where restrictions are reasonably calculated and narrowly drawn to further substantial governmental interests. *U.S. v. O'Brien, supra,* 391 U.S. at 376-77. Where those interests can be achieved by a lesser restraint on individual liberty the State must do so. *Shelton*

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to ban such activity and would have found the restriction unconstitutional. *Id.*, 377 U.S. at 79. Justice Black's view was later cited favorably by this Court in *Police Dept. v. Mosley,* 408 U.S. 92 at 98 (1972).

Many state courts have held that there is a constitutional right to engage in product picketing at the retail outlet. *See, e.g., People v. Muller,* 36 N.E.2d 206, 286 N.Y. 281 (1941);*Ellingsen v. Milk Drivers,* 35 N.E.2d 349, 377 Ill. 76 (1941); *Alliance Auto Service v. Cohen,* 19 A.2d 152 (Pa.S.Ct., 1941); *Mason & Dixon Lines v. Odom,* 18 S.E.2d 841 (Ga. S.Ct., 1942); *Ohio Valley Ad. v. Sign Painters,* 138 W.Va. 355, 76 S.E.2d 113 (1953); *Galler v. Slurzberg, supra,* 27 N.J. Super. 139, 99 A.2d 164; *Netherton v. Davis,* 234 Ark. 936, 355 S.W.2d 609 (1962). *Cf., Goldfinger v. Feintuch, supra,* 276 N.Y. 281, 11 N.E.2d 910; *Johnson v. Milk Drivers,* 195 So. 791 (La. App., 1940); *Fortenbury v. Superior Court, supra,* 16 Cal.2d 405, 106 P.2d 411; *Englander v. Tishler,* 280 App.Div. 217, 112 N.Y. Supp.2d 611 (1952).

[171]The dissenters in *Tree Fruits, supra,* could justify a total prohibition on all consumer picketing under the First Amendment only "when, as here, *other methods of communication are left open*". 377 U.S. at 93 [Emphasis added]. Under § 1385(B)(7), *no* channels are left open if the effect is to induce or encourage a management decision not to handle a product.



*v. Tucker, supra,* 364 U.S. 479; *U.S. v. Robel, supra,* 389 U.S. 258.

In prohibiting not only expressive conduct but also the purest forms of verbal communication, Section 1385(B)(7) extends far beyond any legitimate state interest in regulating particular hamful conduct, and imposes a blanket censorship on free discussion of the facts of a labor dispute. Throughout the course of this litigation, the State and the growers have failed to suggest any constitutional rationale for the Free Speech restrictions of Section 1385(B)(7). Instead they advance innuendo, implying that this provision is necessary to fully prohibit "secondary" boycotts.[172] This position is untenable. Whatever secondary activity the State can regulate is already prohibited by Section 1385 (B)(6).[173]

Although direct or indirect encouragement of retail managers to stop selling a particular product falls squarely with the realm of protected boycott activity, it is still prohibited by Section 1385(B)(7). Thus, Section 1385(B)(7) reflects an intrusive and biased concern that third parties may be *persuaded* by the message espoused by a union to act against the interests of an agricultural employer, a crass economic interest evident throughout the AERA: insulation of agricultural growers from the economic impact of farmworker organization. This economic interest, however, can never justify the severe encroachment on fundamental freedoms found in Section 1385(B)(7):

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[172]Appellants repeatedly refer, without explanation, to consumer product boycotts as "secondary pressures". *See, e.g.,* Brief for the Appellants, p. 59.

[173]§ 1385(B)(6) incorporates Arizona's already-existing secondary boycott restrictions of § 1323. *See,* fn. 155, *supra.*

> It may be that effective exercise of the means of *advancing public knowledge may persuade some* of those reached *to refrain from entering into advantageous relations* with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But *the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.* (*Thornhill v. Alabama, supra,* 310 U.S. at 104; emphasis added.)

*See also, Virginia Pharmacy v. Virginia Citizens' Consumer Council, supra,* 425 U.S. at 764-70.

While prohibiting and imposing penal sanctions on all communication between union and retail management which might encourage a decision to stop handling a product, the AERA contains *no restriction* on growers inducing, through economic coercion or otherwise, retail management to stock products which are the subject of a labor dispute. For example:

> (1) Although a union supporter could not ask that non-union tomatoes be removed from the shelves because of pesticide contamination, an agricultural grower could freely market those tomatoes as a "natural" food, implying that consumption would be entirely healthful.
>
> (2) While an agricultural grower could urge retailers and consumers to purchase its non-union lettuce on the basis of a low price, a union could not explain to purchasers that the cheap price is due to substandard wages paid the farmworkers who cultivated and harvested that lettuce.



Discriminating between messages which the public may hear is censorship in its most odious form and is unconstitutional under both the First and Fourteenth Amendments. *Cox v. Louisiana,* 379 U.S. 536 (1965). "Far from being tailored to a substantial governmental interest, the discrimination . . . is based on the content of . . . expression. Therefore, under the Equal Protection Clause, it may not stand." *Police Dept. v. Mosley,* 408 U.S. 92 at 102 (1972).[174]

**D. Summary.**

Section 1385(B)(7) prohibits pure verbal speech between a union and those members of the public most interested in the facts of an agricultural labor dispute, management and consumers. Union activity which should be most encouraged, peaceful verbal communication, is completely outlawed if it encourages a management decision not to handle a certain product. Talking with a member of the public, a store manager, is made a crime in Arizona for farmworkers seeking support in a labor dispute. The threat of *ex parte* restraining orders hangs over every word spoken or written by a union and its supporters in attempts to reach the public about labor-management disputes. *Cf., Thomas v. Collins, supra,* 323 U.S. at 534.

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[174]Furthermore, while § 1385(B)(7) would prohibit communication by a union to consumers or management urging a boycott of non-union milk, an appeal by the Governor urging a public boycott of all dairies not complying with federal standards for aflatoxin levels (a carcinogen) in milk would be lawful. Governor Babbitt did precisely this in 1978. *See, Mother Jones,* p. 9 (Dec., 1978). Similarly, a clergyman could speak privately with a retail store manager and ask that certain products be removed from the shelves because they were grown by an avowedly atheist commune. A nun, asking the same store manager to remove grapes from the shelves because they were grown by an avowedly anti-union grower would be guilty of violating § 1385(B)(7).

The possibility of a limited interpretation by a state court or administrative agency cannot save Section 1385 (B)(7) from its facial defects:

> If there is an internal tension between proscription and protection in the statute, *we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.* Broad prophylactic rules in the area of free expression are suspect [citations omitted]. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms. (*N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963).)

Statutes regulating fundamental rights, including freedom of expression, must be carefully tailored to serve legitimate state interests. *Dunn v. Blumstein,* 405 U.S. 330 (1972); *U.S. v. Robel, supra,* 389 U.S. 258; *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Shelton v. Tucker, supra,* 364 U.S. 479. Section 1385(B)(7) dismally fails any such test.

## VI.

## SECTION 1385(B)(12), BY OUTLAWING ALL RECOGNITIONAL, ORGANIZATIONAL AND INFORMATIONAL PICKETING AND BOYCOTT ACTIVITY, MERELY UPON THE FILING OF AN ELECTION PETITION BY AN EMPLOYER, UNCONSTITUTIONALLY RESTRICTS FIRST AMENDMENT RIGHTS.

Section 1385(B)(12) broadly prohibits labor organizations from picketing, boycotting, or threatening to picket or boycott, an agricultural employer for recognitional or organizational purposes where an election petition has been filed under Section 1389. Since Section 1389(C)(2) allows an employer election petition, Section 1385(B)(12)



extends to a grower the unrestricted power to prohibit picketing and boycott activities. Not only is the provision facially overbroad in its regulation of activities protected by the First Amendment, but it operates as an unlawful prior restraint of such activities.

### A. Broad Departure From Federal Act.

In Section 1385(B)(12), Arizona wrote a complete prohibition of traditional union activities to secure organization and recognition. The Statute's language significantly and intentionally sweeps more broadly than analogous language found in Section 8(b)(7) of the NLRA (29 U.S.C. Section 158(b)(7)). The history of Section 8(b)(7), and its practical effect, supplies a perspective from which the significant impact of Section 1385(B)(12) can be appreciated.

Section 8(b)(7) of the NLRA has been described as a limited regulation designed to remedy a very specific evil. *International Brotherhood of Teamsters, Local 344 v. N.L.R.B.,* 568 F.2d 12, 21 (7th Cir., 1978). The federal regulation operates only when a union fails to file a petition for a representational election within thirty days of the commencement of picketing. Recognitional and organizational picketing can continue pending the holding of an election and certification of the results if a petition has been filed. *Dayton Typographical Union No. 57 v. N.L.R.B.,* 326 F.2d 634, 647 (D.C. Cir., 1963).

A broad range of organizational and recognitional activities are excluded from regulation under Section 8(b)(7) of the NLRA. It affects only picketing, and has no application to boycott activity. An explicit free speech proviso,

omitted from the AERA, allows a union to engage in informational picketing at any time.[175] *N.L.R.B. v. Knitgoods Workers Union Local 155,* 403 F.2d 388, 390 (2nd Cir., 1968); *Dunn v. Retail Clerks International Associations,* 307 F.2d 285, 289 (6th Cir., 1962). "Area standards" picketing to inform the public that an employer does not maintain union standards is thereby protected. *Centralia Building and Construction Trades Council v. N.L.R.B.,* 363 F.2d 699, 701 (D.C. Cir., 1966). The AERA prohibits similar conduct in agriculture. Arizona's intent to prohibit informational picketing is further established by the substitution of the terms "induce, encourage, force or require" for the language of the federal act prohibiting activities aimed at "forcing or requiring" an agricultural employer or employees to recognize or support the union.

In upholding Section 8(b)(7) of the NLRA against constitutional challenge, the courts have relied upon these limiting features of the provision. *Dayton Typographical Union No. 57 v. N.L.R.B., supra,* 326 F.2d at 646-649.

**B. Section 1385(B)(12) Provides An Agricultural Employer With Power To Totally Ban Free Speech Activities.**

Once anyone, including an agricultural employer, files an election petition under Section 1389 of the AERA, *all*

[175]The proviso states:

> *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. (29 U.S.C. § 158(b)(7).)



boycott and picketing activity aimed at promoting recognitional or organizational purposes becomes criminal. In outlawing informational picketing, Section 1385(B)(12) far exceeds any reasonable regulation the state may enact regarding picketing. Moreover, the regulation extends far beyond any concern for agricultural production, by reaching boycott activities, including informational leafletting and oral communications made in support of a primary boycott. The broad sweep of Section 1385(B)(12) completely stifles any right of a union to free expression after the filing of an election petition. As this Court noted in *Thornhill v. Alabama, supra,* 310 U.S. at 102:

> Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensible to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by the regulations such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem.

In addition, whereas the federal regulation applies only when a union seeks to engage in indefinite recognitional or organizational picketing and fails to file an election petition within thirty days, Section 1385(B)(12) operates to broadly restrict a union's activities upon the action of anyone who files an election petition. Under Section 1389(C)(2) of the AERA, an agricultural employer may file an election petition when it alleges that one or more individuals or labor organizations have presented a claim to be represented. When these conditions are met, an employer has

total control over union organizational and recognitional activities, and can halt them by filing an election petition.

Moreover, an employer can file an election petition alleging that a claim has been presented to him, and on that basis obtain an order restraining all strike or boycott activity under Section 1393(B).[176] Section 1393(B) requires the court to issue a restraining order based on these allegations, without allowing prior inquiry into the truth of the employer's allegation that a representational claim has been made.[177]

This Court has frequently invalidated state regulations which condition the exercise of First Amendment freedoms on the undirected discretion of local officials. *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Cox v. Louisiana, supra*, 379 U.S. 536; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969). Section 1385(B)(12) takes these regulations

[176] § 1393(B) is discussed at length in Part III, *supra*.

[177] In addition, an employer could obtain such a restraining order by inducing an individual to make a claim on him for representation. The NLRA contains explicit safeguards against such conduct which were omitted from the AERA. In the first place, the NLRA does not permit private parties to obtain injunctions of conduct violative of § 8(b)(7). Secondly, the provision authorizing the Board to obtain a restraining order, § 10(1) (29 U.S.C. § 160(1)), provides a safeguard against the issuance of such orders where there is reasonable cause to believe that an employer has dominated, supported, or interfered with a labor organization. The NLRA provision reads, in pertinent part:

> *Provided further*, That such officer or regional attorney shall not apply for any restraining order under Section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the premliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. (29 U.S.C. § 160(1).)

Arizona deliberately omitted this safeguard against collusive use of the provision by an employer. (*See*, AERA § 1390(K).)



a step further, by entrusting an interested employer with the power to mandate a total ban of organizational and boycott activities by a labor organization.

The Act's enforcement reflects the abuse of First Amendment rights which results from the operation of Section 1385(B)(12). In two separate actions, employers filed election petitions to prevent picketing by the Teamsters. In both cases, the employers withdrew the election petition after the end of the season and no elections were held.[178] Thus, actual experience illustrates the self-executing nature of the ban the Statute places on free expression, and the improper nature of the power it gives to employers.

The very existence of Section 8(b)(7) of the NLRA, as a limited regulation of expression tailored to further a specific governmental interest, points out the invalidity of Section 1385(B)(12). In the area of the regulation of First Amendment freedoms, it is well established that where the government can further its interest by a lesser restraint on individual liberty at little or no added inconvenience, it must do so. *Shelton v. Tucker, supra*, 364 U.S. 479; *United States v. Robel, supra*, 389 U.S. at 267-68.

[178] These cases are set forth in Enforcement Stipulation, Items 6, 8; A. 84. The formal documents are included, *Id.*, Items 6, 8; A. 84, 148-62.

## VII.

## THE AERA'S ELECTION PROCEDURES FRUSTRATE WORKER EFFORTS TO DESIGNATE A COLLECTIVE BARGAINING REPRESENTATIVE WHILE ITS LIMITATIONS ON PERMISSIBLE COLLECTIVE BARGAINING PREVENT MEANINGFUL NEGOTIATIONS, THEREBY REPUDIATING THE STATED POLICIES OF THE AERA AND VIOLATING THE CONSTITUTIONAL RIGHT OF ASSOCIATION.

Appellants urge that the AERA's recognition procedures withstand constitutional scrutiny because the mandated election procedures (Section 1389) allow accelerated elections similar to the California Agricultural Labor Relations Act[179] and adopt the recognition provisions of the National Labor Relations Act.[180] The unequivocal statutory language and the record before the District Court belie this attempted comparison, and thus the State's conclusion: That the AERA's recognition procedures do not unduly burden constitutionally-protected associational interests. Close scrutiny of the Act reveals significant interference with the associational interests of Arizona farmworkers, both in the available opportunity to designate a collective representative and to negotiate a meaningful collective bargaining agreement. The State comes before this Court with no substantial policy justifying or explaining this interference.

The State and the growers attempt to dislodge the District Court's invalidation of the AERA's representation

[179]California Labor Code § 1140 *et seq.*

[180]Brief for the Appellants, at 58.



section by masking it from this Court's scrutiny with a smokescreen of purportedly impregnable "legislative policy choice."[181] Yet, they concede the Act's election procedure substantially inhibits designation of a collective bargaining representative in 78% of Arizona's agricultural employment,[182] a concession which focuses the insubstantiality, and constitutional inadequacy, of any claimed "policy choices" reflected in the comprehensive regulation (and, as will be shown, undermining) of Arizona farmworkers' associational interests. This Court, as did the District Court, clearly has the mandate to "strike through the mask"[183] the State invokes and to weigh the Act's recognition procedures against the infringement of associational rights these procedures work.

Even if workers could succeed in designation of a union to represent their interests to a grower, the Act insulates him from a duty to negotiate many important and funda-

[181]Brief for the Appellants, at 53 *et seq.*

[182]Brief for the Appellants, at 46. Appellants' argument that the election procedures must be unworkable in *all* circumstances reveals a fundamental misreading of this Court's delineation of the constitutional right of association. In *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958), there was no requirement that petitioner show that compelled disclosure inhibited all its members; rather, this Court was concerned with the challenged statute's "substantial restraint" (*Id*, 357 U.S. at 463) upon associational interests. As the discussion which follows reveals, the Act works a "substantial" interference with the associational rights of Arizona farmworkers.

[183]

> "Hark ye yet again,—the little lower layer. All visible objects, man, are but as pasteboard masks. But in each event—in the living act, the undoubted deed—there, some unknown but still reasoning thing puts forth the moulding of its features from behind the unreasoning mask. If man will strike, strike through the mask."

Herman Melville, *Moby Dick*, 139 (Riverside Edition, 1959).

mental issues in labor-management relations.[184] For example, under the Act growers statutorily maintain a right to terminate employees at will and workers cannot insist upon a contract requiring cause for termination of employment. A union, and its agents, become liable to criminal prosecution for raising, at the negotiating table, seniority job assignment, just cause for discharge or severance pay for inclusion in a contract.[185] Such prohibitions, of which numerous other examples can be presented, effectively withdraw any opportunity for meaningful collective bargaining.

The constitutional right of association[186] stands as an effective check upon the extensive interference with associational interests which the Act produces. This right, recognized as applicable to labor unions,[187] protects Arizona farmworkers' efforts to organize together for advancement of their wages and working conditions. This protection prohibits Arizona's enactment of legislation foreclosing farmworker organizing for collective gains; yet, the AERA is precisely such an enactment. No policy justifies the barriers to farmworkers' organizational interests erected by the Act, thus mandating the District Court's conclusion that it "frustrat[es] the right of free assembly and association."[188] The record reveals the absence of any support

[184]§§ 1384, 1385(B)(11) and 1385(D).

[185]See discussion, at Part VII, C, *infra*.

[186]*See, e.g., Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *N.A.A.C.P. v. Alabama, supra*, 357 U.S. at 460-61.

[187]*United Mine Workers v. State Bar of Illinois*, 389 U.S. 217, 221-22 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5 (1964).

[188]A. 487.



for the State's facile claim that the AERA reflects a permissible enactment based upon "available policy choices."[189]

Arizona's stated policy, the touchstone by which to examine the validity of the Act's election procedures and collective bargaining restrictions, recognizes "that agricultural employees shall be free to organize, to take concerted action, and through representatives . . . enter into collective bargaining agreements establishing their wages and terms and conditions of employment . . . ."[190] Repudiating this statement of policy, the Act's recognition procedures, and the limitations placed upon the scope of collective bargaining, frustrate workers' advancement of wages and conditions of employment through collective bargaining. The Act's substantive and procedural dictates, when viewed with reference to the circumstances in which they were intended to operate, undermine and mock the State's declaration of a policy encouraging farmworker organizing and collective bargaining. This mockery, "illogical and unjust" (*Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)), also sustains the District Court's invalidation of the election section of the Act; the total disharmony between stated purpose and implementing language is constitutionally infirm.[191]

[189]Brief for the Appellant, at 54.

[190]§ 1381. This declaration of policy reappears in the substantive rights accorded farmworkers. § 1385, which declares the rights of agricultural employees, incorporates the Arizona policy as set forth in § 1381.

[191]Where a state posits a substantial right, as occurs under the Act for Arizona's farmworkers (Section 1385), constitutional principles require a logical and justified relationship between the right and its

### A. The Act's Election Procedures Disenfranchise Substantial Numbers of Employees With an Interest in Designation of a Collective Bargaining Representative and are Unworkable in the Context of Agriculture, Thus Preventing Agricultural Workers From Securing Recognition of a Collective Bargaining Representative.

Farmworkers, just as other workers, have a substantial interest in designation of a representative for collective negotiations with a grower. The Act purports to recognize this interest.[192] Yet, the AERA denies many farmworkers the opportunity to express this interest by incorporating extremely narrow definitions of those workers able to participate in a representation election. This denial relegates many workers to a second class participation in any decision concerning their representation by a union and permits a minority of the workforce to dictate whether a collective bargaining agent will be recognized. Excluded from the State's recognition process, these workers are impotent to associate together to advance their wages and working conditions through collective action.

Even for workers deemed eligible to participate in a representation decision the Act operates to frustrate any desire for representation by a union. The periods of substantial employment in the majority of crops produced by

implementation. *See, e.g., Jiminez v. Weinberger*, 417 U.S. 628 (1974); *Weber v. Aetna Surety & Casualty Co., supra*, 406 U.S. at 175. *Cf., Hampton v. Mow Sun Wong*, 426 U.S. 88, 113-16 (1976).

[192]§ 1385.



Arizona agriculture are very short, usually numbering only several weeks for any employer.[193] Ignoring this fact, the Arizona Legislature has dictated election procedures under the Act incapable of operating during the course of the short season. Workers interested in designation of a collective representative are foreclosed from expression of that interest. Effectively, the Act "legislatively delays" the opportunity for farmworkers to designate a collective bargaining representative and declares as unlawful any concerted action to overcome that delay.[194]

#### 1. The Act Writes Exclusions Incomprehensible in Light of the Act's Purpose and the Constitutional Right of Association.

The Arizona Legislature's obvious concern in enactment of the AERA was the whole of agriculture, for one stated purpose of the Act is prevention of interference with the marketing of agricultural commodities.[195] Abandoning this concern when considering workers' rights, the Act writes exclusions incomprehensible in view of the Act's ostensible coverage of the whole of Arizona's agricultural production. In excluding a large number of workers from representation decisions, the State places a substantial burden upon their right to associate.[196]

[193]A. 471, 283-89.

[194]§ 1385(B)(12).

[195]§ 1381. One of the declarations in this statement of policy is that agricultural employees hold a disproportinate share of the economic power in the agricultural context. This finding is unsupportable and unacceptable. *See*, Cohen and Rose, *State Regulation of Agricultural Labor Relations*, 1973 Law and Soc. Order 313, 315-22 (1973).

[196]In this light, the exclusions of the Act are comprehensible only if the Act's true aim is to disenfranchise most workers and to defeat unionization.

The Act sets forth narrow classes of persons deemed competent to participate in the designation of a collective bargaining representative. It defines "agricultural employee" to include only two groups of workers: (1) Permanent employees who have worked for six months during the preceding calendar year and (2) temporary employees who have worked in the growing or harvesting of farm products during the preceding year for the employer.[197] An employee working for an employer in a previous harvest season as well as a current season in the same calendar year cannot participate in an election proceeding. New employees with the expectation of returning the following year are denied the opportunity to express a desire for collective representation by a union. A long-term employee missing the preceding year for any reason is statutorily incompetent to express his interest regarding a union.[198]

[197] § 1382(1) reads, in pertinent part, as follows:

> "Agricultural employee, permanent" means any employee over sixteen years of age who has been employed by a particular agricultural employer for at least six months during the preceding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field. "Agricultural employee, temporary" means any employee over sixteen years of age who is employed by a particular agricultural employer and who has been so employed during the preceeding calendar year, engaged in the growing or harvesting of agricultural crops or the packing of agricultural crops where packing is accomplished in the field.

[198] The Act's definition of agricultural employee means, for example, that if a representation proceeding is held in December of any year, a permanent employee working since the previous July 2nd (over a year and a half) is unable to participate in the election. § 1382; Regs. § R4-201(A)(7). *Compare, Kusper v. Pontikes, supra,* 414 U.S. 51. Appellants, straining to avoid this impact of the term "calendar year" (Jurisdictional Statement at 21) ignore the clear language of the Act. *See,* discussion, Part II, *supra.*



The statutory exclusion of new employees invites employer manipulation of the workforce to interfere with any organizing efforts. Since a grower enjoys a statutorily-protected right to subcontract work, he could, one year, employ the workers to produce his crop and the next year utilize employees supplied through a labor contrator.[199] Such a practice would effectively deny his workers any means to express an interest for collective representation. Active union supporters could be threatened with discharge or loss of benefits by an employer with the Act's prohibitions proscribing such conduct only if the *sole*[200] motivation for such conduct was anti-union animus; tardiness on one occasion would legitimate such threats.

The statutory exclusions written by the Act's definition of agricultural employee and the opportunities for employer determination of eligibility burden farmworkers' constitutional right of association. One, if not the primary, purpose for farmworker organization is "to exert influence upon [an employer] . . . to induce him to make better terms with them." *American Foundaries v. Tri-City Central Trades Council,* 257 U.S. 184, 209 (1921). Under the Act, certification pursuant to election proceedings stands as an absolute barrier to a demand for collective negotiation. The Act deprives many workers of any opportunity to participate in elections and thereby frustrates the very purposes for which farmworkers organize. This constitutes an imper-

[199] The definition of agricultural employer excludes employers with less than six agricultural employees. § 1382(2). However, under this section, an excluded employer can elect coverage. By an election to be covered, this small employer could invoke the procedures of the Act to restrict picketing and boycotts but nonetheless, by manipulations of employment, prevent representation proceedings.

[200] § 1385(A)(7).

missible burden on the right to associate, for the Act's deprivation to many workers "of any voice in choosing" a union representative "substantially abridge[s]" their "ability to associate effectively with" the union of their choice. *Kusper v. Pontikes, supra*, 414 U.S., 58.

*N.A.A.C.P. v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), squarely stands as a constitutionally-based condemnation of the restraint upon associational interests written by the Act. In *N.A.A.C.P. v. Alabama,* this Court recognized that state statutes which inhibit a person from joining with others for common benefit cannot stand without some substantial justification. Just as disclosure of membership may cause unwillingness to join an organization, denial to a worker of the right to participate in designation of a collective bargaining representative undermines any desire or opportunity to associate with others for collective action to better wages and working conditions.

The State can point to no justification for the infringement of associational interests which the definitions of "agricultural employee" cause. *See, Williams v. Rhodes,* 393 U.S. 23, 31 (1968). Nothing suggests that workers deemed incompetent to participate in election proceedings have any less interest in representation decisions than those workers permitted by the Act to participate in such decisions.

The Act incorporates other exclusions of agricultural workers which similarly are inexplicable in terms of the Act's policy. Excluded from the statutory definition of agricultural employees are all individuals "[e]ngaged in hauling or stitching functions." These workers perform



functions integral to the transfer of agricultural commodities from the site of production (the field) to the point of distribution or processing; "stitchers" make the boxes in which produce is packed, while "haulers" transport goods from the field to a processing shed or marketing location. An interruption of these functions closes down the harvest operations, affecting not only the marketing of crops, but placing harvest workers out of work.[201] Despite the Arizona Legislature's stated concern for interruptions in the marketing of perishable commodities, it has written the total exclusion of "haulers" and "stitchers" from the Act. Similarly, another exclusion illogically declares workers under sixteen unable to participate in representation proceedings in spite of Arizona's determination that agricultural workers under sixteen are qualified to negotiate their own wages.[202]

The Act effects, with an unjustified consistency, an interference with the right to associate by radically circumscribing the class of workers eligible to participate in representation proceedings. This result, constitutionally foreclosed, also reflects a statutory rejection of the stated purpose of the Act to encourage collective action by workers. Similar conclusions are inescapable upon scrutiny of the election procedures dictated by the Act.

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[201] A. 391-94.

[202] Arizona has adopted a Minimum Wage for Minors law, which establishes a commission with power to designate wages for minors under 16 in all activities where they are employed, except domestic and *agricultural* work. A.R.S. § 23-311 *et seq*. Persons under 16 are readily able to work in the fields. A.R.S. § 15-321(B)(6).

**B. The Recognition Provisions of the Act Deny Farmworkers the Right To Designate a Collective Bargaining Representative.**

The State and the growers are content to characterize the AERA's representation provisions as an improvement upon the NLRA and thus beyond reproach.[203] Such an analysis ignores simple, yet crucial differences: The AERA designates procedures which effectively eliminate recognition through an election by ignoring the circumstances of the industry in which they are designed to operate and prohibits all non-election methods of securing recognition.

The State's invocation of an ostensible parallel between the AERA and the NLRA ignores the undisputed fact that the AERA was purportedly designed in response to unique circumstances in agriculture.[204] Appellees have not asserted that better procedures could have been designed, but that the representation procedures of the AERA preclude legitimate demands for recognition advanced by a labor organization. This conclusion, as found by the District Court, is inescapable.

Despite the seasonality of Arizona agriculture, the Act avoids any legislative determination of the appropriate time for the filing of a petition seeking recognition.[205] This omission statutorily allows less than one per cent of the employees of an employer during the course of a year to

[203]Brief for the Appellants, at 56-57.

[204]*See*, § 1381.

[205]In contrast, the California Legislature in the California Agricultural Labor Relations Act, *supra* at n. 66, specified that an election petition was timely only during periods when 50% of an employer's highest yearly workforce was employed. Calif. Labor Code § 1157.3. This insures that a substantial percentage of the workforce is working when election proceedings are held.



designate the collective bargaining representative for all employees in similar jobs. The lack of any limitation on the timeliness of a petition for recognition allows elections held when a substantial number of the workers are absent to dictate the collective bargaining agent to which the employees must look or to prevent the holding of an election; the large segment of an employer's workforce would be required to look to a collective bargaining representative preferred by only a small minority. The right to organize has little importance if any effort to select a representative can be halted by the acts of a substantial minority of an employer's workforce.

This infringement upon associational interests could not be remedied by incorporation into the Act of a requirement that elections are timely only during periods of substantial employment on a particular farm. The Seasonality Stipulation reveals that, except in some isolated instances, the period of at least fifty per cent employment for any one employer lasts no longer than five weeks.[206] Any analysis of the Act's election procedures must thus proceed with this backdrop of a five week election period, a time undisputably too short for completion of all the prerequisites for a certification election.

Some organizational activity among employees must occur prior to any submission to the AERB of a claim to be recognized as the collective bargaining agent for those employees. Procedurally, authorization cards from at least thirty per cent of an employer's employees must be

[206]A. 192 *et seq*. See also, Plaintiffs' Exhibit 1 summarizing the Seasonality Stipulation; A. 283-89. The District Court found that short seasons predominate. A. 471-72.

secured.[207] Practically, workers must be informed of the benefits of unionization, allowed to explore any doubts, and advised of the right to designate a collective bargaining representative. A substantial number of the employees must evidence support for a union prior to a petition, or the mere act of petitioning will result only in a lost election if one is held. The undisputed testimony revealed that a three to six week period of organizing prior to a petition must occur for an election to have any meaning.[208]

The substantial part of this organizing cannot precede the commencement of the period of substantial employment for the simple reason that prior to employment many workers are unavailable; workers in agriculture migrate long distances to reach the job. And, communication with workers requires time-consuming individual contact. Under the best of circumstances, a three week period for organizing during substantial employment must precede an election petition. Under the constraint of a five-week harvest season, the election must follow within two weeks of the filing of a petition to avoid a year's delay in recognition proceedings; this the Act forecloses.

Upon the filing of a petition, Section 1389(C) requires a pre-election hearing to determine whether a question of representation exists and to designate the appropriate bargaining unit. The regulations of the AERB require this

[207] § 1389(C)(1).

[208] A. 335-40. *See also, Agricultural Labor Relations Board v. Superior Court,* 16 Cal.3d 392, 546 P.2d 687, 128 Cal.Rptr. 183 (1976), *appeal dismissed,* 429 U.S. 802 (1976), *see infra,* fn. 234. The organizational problems are compounded because of agricultural employees' unfamiliarity with unions. Unionization in agriculture is a comparatively recent occurrence.



hearing to develop "a full and complete record" and the hearing officer has the right to continue the hearing and to allow for the filing of briefs within seven days of the conclusion of the hearing. Any decision must be served upon all parties.[209] The Act and the regulations thus contemplate extended pre-election proceedings before a decision directing an election, such a decision being the purpose for which the hearing is held. Although experience under similar procedures shows that similar procedures consume 45 days between the filing of a petition and the direction of an election,[210] under the best of circumstances the AERB might be able to direct an election fourteen to twenty-one days after the filing of a petition.[211]

Following the direction of an election, the Act mandates an inexplicable ten-day hiatus in election proceedings.[212]

[209] Regs. § R4-222 provides, in pertinent part, as follows:

> A. [Representation] hearings shall be conducted by a hearing officer and shall be open to the public. . . . It shall be the duty of the hearing officer to inquire fully into *all* matters in issue and necessary to obtain a full and complete record. . . . A copy of the decision shall be served on all parties.
>
> B. The hearing officer may, in his discretion, continue the hearing from day to day or adjourn it to a later date. . . .
>
> C. . . . The hearing officer may allow oral argument, briefs to be submitted or both. Where briefs are to be submitted, any party desiring to do so shall file the original and one copy within seven (7) days after the close of the hearing provided however, that prior to the close of the hearing and for good cause shown, the hearing officer may grant an extension of time not to exceed an additional seven (7) days. (A. 539-40; emphasis added).

[210] A. 411-14.

[211] This time period accounts for the necessity of providing "due notice" of the hearing to the parties, setting the hearing, taking evidence and the rendering of a decision. Of course, this assumption presumes the unlimited availability of hearing officers. If many petitions were filed at the same time, the demand upon the Board would substantially delay the estimated time for a hearing.

[212] § 1389(I).

An employer has this period of time to prepare the list of eligible employees. Upon receipt of this list, the Board must transmit it to the interested unions. If the list were immediately transmitted, an election might reasonably follow within four or five days. Some time must elapse between the union's acquisition of the list and the election to allow for the union's communication with the eligible voters and verification of the accuracy of the list.[213] Without some time for these activities, workers cannot be assured of an opportunity to hear all viewpoints.

At this juncture, however, the five week period of substantial employment has long since expired and the workers have dispersed to new jobs. An election which includes a substantial number of the employer's workers cannot be held. Thus, indulging all reasonable assumptions which the State has advanced to claim that the Act's election procedures do not frustrate employees in their designation of a collective bargaining representative, analysis of the Act's election procedures reveals, as the District Court found, an unavoidable, and unjustified, delay which destroys such a designation of a collective bargaining representative during the period when substantial numbers of employees are employed.

In these circumstances, the Arizona Legislature has chosen to channel all contested claims for recognition by a labor organization through the Act's unworkable election

[213]In *Excelsior Underwear, Inc., supra,* 156 N.L.R.B. 1236, 61 L.R.R.M. 1217, the N.L.R.B. considered the various reasons why a pre-election list of names and addresses of employees was necessary to insure a free and fair election. The Board recognized the importance of the list in allowing a union to expose the worker to its viewpoints (*Id.,* 156 N.L.R.B. at 1240-41) and to investigate the accuracy of the list. *Id.,* 156 N.L.R.B. at 1243.



procedures.[214] While prior to enactment of the AERA a labor organization could utilize concerted economic action to compel recognition,[215] this right was supplanted by the statutory necessity for election certification. Appellees do not contend that this replacement *per se* violates any constitutional provisions; however, when viewed in the context of Arizona agriculture and its effect on associational interests and Arizona's stated policy favoring collective bargaining, exclusive reliance upon the election procedures set forth in the Act cannot be constitutionally justified.

The undisputed evidence before the District Court reveals the highly seasonal nature of major agricultural crops in Arizona. As the Court found, the length of harvest seasons varies from three or four weeks in cantaloupes, lettuce and grapes to ten or eleven months for citrus and green onions; the short harvest period is the rule rather than the exception. Even in the crops with longer harvest seasons, employees do not spend the entire season with one employer. Work with any one employer is intermittent.[216]

As noted above, short seasons and frequent changes in employers impart substantial difficulties to an election-

[214]§ 1385(B)(12).

[215]Unquestionable is a labor organization's right to engage in concerted economic action for recognitional purposes where regulation of labor relations has not been enacted. *See, generally, American Foundaries v. Tri-City Central Trades Council, supra,* 257 U.S. 184, 209; *N.L.R.B. v. Jones & Laughlin,* 301 U.S. 1, 33 (1937); *Texas & New Orleans R. R. Co. v. Brotherhood of Railway & Steamship Clerks,* 281 U.S. 548, 570 (1930); Witte, *Early American Labor Cases,* 35 Yale L. J. 825 (1926). Arizona has implicitly recognized this right through its adoption of a "little Norris-LaGuardia Act" (A.R.S. § 13-1808 (West's 1971)) which limits the jurisdiction of the State's courts to issue injunctions in labor disputes. *Cf.,* § 1395(a).

[216]A. 471-72. With regard to intermittent employment in citrus, see A. 371-72 and § 1382(2).

based recognition procedure. Without substantially expedited procedures, a large number of employees terminate their employment prior to the opportunity to vote for a collective bargaining representative. Mr. Lubin, with extensive experience in another short-term industry noted that the experience of construction unions under NLRA procedures had resulted in the abandonment of the election as a vehicle to secure recognition.[217] Similarly, Mr. Cherry, the State's expert with extensive experience in Arizona labor relations, was hardput to recall a circumstance in which election procedures had been utilized to resolve representation issues in agricultural packing sheds.[218] The experience under the Act confirms these observations. At the Cactus Ranch, Teamsters Local 274 filed a petition for certification on November 22, 1974, when seventy-two workers were employed in the lettuce harvest.[219] During the following two weeks, a minimum of sixty-one employees were working.[220] However, the Board did not schedule a hearing until December 3, 1974, and the election was directed for December 17, 1974. At this time, the company had finished its harvest and no employees remained.[221] The election petition was withdrawn. The Act had served the purpose for which Appellees submit it was intended.

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[217]R. 371-73.

[218]A. 452-53. Mr. Cherry testified as follows:

> Q. Can you tell us generally when these elections [in seasonal industries] occurred that you are referring to?
> A. Well, they occurred some time between 1956 and 1973.
> Q. Can you be more specific than that?
> A. I sure couldn't.

[219]Enforcement Stipulation, at Item 5; A. 83-84; Seasonality Stipulation, A. 229-30.

[220]A. 229-30.

[221]*Id.*



The changed acceptance of labor unions since their rather hostile reception upon first appearance does not obscure their continuing primary purpose as recognized by this Court in *American Foundaries:* the advancement of the individual's welfare through joint action leading to collective bargaining with an employer.[222] *American Foundaries v. Tri-City Central Trades Counsel, supra,* 257 U.S. at 209. Deprived of the ability to negotiate with an employer, a labor union loses its basic purpose. Without some opportunity to negotiate jointly with an employer, workers have little incentive to associate together in unions. Any statute restricting the possibility of workers' collective negotiation with an employer necessarily frustrates the associational interests of the workers.

The AERA's representation procedures operate to work such a frustration. The Arizona Legislature has denied agricultural unions all methods of recognition other than an election procedure. And, the election procedure serves, in the majority of instances, to deny agricultural employees the opportunity to express a preference for a collective bargaining representative. Not only are the classes of workers deemed competent to participate in representation proceedings narrowly stated, but the pre-election procedural requirements found both in the Act and under the AERB regulations preclude the holding of an election during the period when a substantial number of the workers are present. In effect, then, the Act significantly restricts workers' efforts to designate a collective bargaining representative.

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[222]*See also,* Taylor and Witney, *Labor Relations Law,* 3 (1971).

Since the explicit recognition of constitutional protection for associational interests, union activities have stood under the umbrella of constitutional protection. *E.g., United Mine Workers v. State Bar of Illinois,* 389 U.S. 217, 221-22 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1, 5 (1964). Under the principles defining the right of association, a statute becomes constitutionally suspect when it constitutes "a 'substantial restraint' and a 'significant interference' with the *exercise* of the constitutionally protected freedom of association." *Kusper v. Pontikes, supra,* 414 U.S. at 58 (footnotes omitted; emphasis added). Thus, a political group deprived, with no justification, of use of university facilities utilized by other groups has been unconstitutionally interfered with. *Healy v. James,* 408 U.S. 169 (1972). A statute restricting the right to vote of a member of a political party defeats the member's associational interests. *Kusper v. Pontikes, supra.*

Under these principles, a statute substantially restricting workers' association for the purpose of collective bargaining must fall before the constitutional freedom of association. The Act works such a restriction, for it effectively frustrates employee efforts to secure recognition of a collective bargaining representative. The Arizona Legislature's policy purportedly protecting farmworkers' right to organize is illusory.[223] The AERA's representation sec-

[223]Statutory denials of the Act's declaration of policy riddle the Act. For example, § 1394 limits the AERA "only to such persons, *labor organizations* or activities as are not within the jurisdiction of the National Labor Relations Act. . . ." (Emphasis added.) Of the two unions involved in agriculture, only the United Farm Workers is a labor organization not within the jurisdiction of the NLRA. The Legislature thus intended that the Act's substantive and procedural restrictions on labor organizing should apply only to the United Farm Workers.



tion was correctly found by the District Court constitutionally infirm.

### C. Even If Certified, A Union Faces Extensive And Unjustified Limitations Upon The Scope Of Effective Collective Bargaining, Limitations Which Restrict The Right of Association.

The unrelenting restriction upon effective assertion of associational interests in the AERA's recognition provisions is repeated in the Act's substantive regulation. Eschewing the experience under the NLRA, which provides ready guidance in weighing the Act's impact upon collective bargaining, the AERA consistently extends prerogatives to management while suffocating workers' rights to advancement of wages, hours and working conditions through negotiation.[224] Without the opportunity to negotiate a meaningful collective bargaining agreement, a union stands stripped of its basic purpose.

The Act constructs detailed areas of labor-management relations immunized from union intrusion. Sections 1384, 1385(B)(11) and 1385(D) establish "management rights" which a union cannot effectively raise in negotiations. Section 1385(D) permits an agricultural employer to refuse to bargain over management rights, a term expansively defined to include, *inter alia*, discharge of employees, subcontracting of work, selection of the methods to be used in production, time of work, size and make-up of crews, places of work and hiring, suspension and transfer of

[224]§ 1381.

workers.[225] Section 1385(B)(11) significantly buttresses an employer refusal to negotiate by making it a crime and an unfair labor practice for a union to "intimidate, restrain or coerce [an] employer[]" with regard to any of the management rights defined by Section 1384. Under this language, not only would a strike, boycott or threats thereof, over such management rights be unlawful, but subject to restraint by an injunction.[226] A union negotiator is forced to walk a tightrope between permissible subjects of bargaining and management rights, for any threat of economic action linking a permissible subject with a management right would expose the negotiator to criminal sanctions.

The debilitating effect of the management-rights limitation on bargaining to a union and its members can be easily illustrated. Section 1384(2) reserves to the employer the right "to hire, suspend, discharge or transfer employees in accordance with his judgment of their ability." Under this language, a union cannot insist upon a collective bargaining agreement containing a requirement of "just cause" for dismissal or seniority as a basis for job assignment. The effect of reserving to an employer the absolute power to discharge employees is "to discourage, if not forbid, any presentation of the discharged employee's grievances to [the employer] through a labor organization or his chosen representative, or in any way except personally." *National*

[225] § 1384(1) and (2). The "management rights" defined in § 1384 are obviously intended as subjects upon which a Union cannot bargain without the employer's acquiesence. § 1384(3) specifically notes the interrelationship of § 1384 and § 1385(d) [duty to bargain].

[226] §§ 1393(A) and (B).



*Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 360 (1940). The Act's management rights section thus affirmatively restricts the purposes for which workers can associate together in a union.

The evils of the labor contractor system of employment prevalent in agriculture forced Congressional regulation of labor contractors.[227] Workers are kept inpecunious to maintain the contractor's dominion and housed in isolated facilities with only the contractor to provide for their needs. Clearly, in such circumstances, workers would view collective action through a union as a means to rid themselves of the debilitating restrictions worked by labor contractor system. The Act nonetheless denies farmworkers the opportunity to bargain hard over this obviously fundamental issue. The management rights stated in the Act include absolute employer control of the hiring of employees.[228] A union could not urge a hiring hall or procedures as the means by which employees should be hired, for the employer can refuse to bargain over any issue related to hiring. Such examples as hiring and discharge focus the burdens placed on a union negotiator by the Act.

If a union negotiator presses the interests of the employees he represents and bargains vigorously over matters included within the Act's definition of management rights, he places himself in peril. If his discussions might be characterized as a threat to engage in economic action over such matters, the other procedures of the Act intertwine to place that negotiator in an extremely dangerous position.

[227] Farm Labor Contract Registration Act, 7 U.S.C. § 2041 *et seq.*

[228] § 1384(2).

Criminal sanctions could come into play.[229] An employer also could apply, without notifying the union or the negotiator, to the superior court for an injunction to restrain such discussions.[230] A negotiator for a union, sitting in a room and negotiating a contract, could thus be served with an injunction against his bargaining conduct. This stands as a spectre confronting any union negotiator under the AERA. The intimidation worked by this possibility of an employer injunction or criminal sanctions can be readily appreciated; the Act serves the purpose of insuring that union negotiators will only timidly present workers' interest.[231]

A union demand for negotiation in many subject areas would make the negotiator subject to intimidation through the Act's procedures. Discharge and hiring are not the only subject matters reserved to the exclusive province of the grower. Assignment of work, subcontracting, and crew size are but a few of the subjects which are of obvious concern to workers, but which a union cannot pursue at the bargaining table or through concerted economic action; the Act's expansive definitions of "management rights" (Sections 1384 and 1385(D)) suggest there are many others unstated in the Act. Without the ability to raise such issues, workers are able to find little to be realized through associating together. The Act's extensive reservation to growers of management rights effectively means that a

[229] §§ 1385(B)(11), 1392.

[230] §§ 1385(B)(11), 1393.

[231] This result is far distant from the right to bargain collectively which the Act purports to extend to agricultural employees. At the Mad Hatter's tea party, in *Alice in Wonderland*, the March Hare asks Alice if she would care for some wine. When she replies that she would, he tells her there isn't any. Lewis Carroll, *Alice in Wonderland*, Norton & Company, 1971, p. 54.



worker's employment depends solely upon the good will of the grower, not the protections of a collective agreement. Similarly, a union has little to offer the worker as benefits of unionization; effectively censored at the bargaining table and prohibited from encouraging economic action, the union can do little to advance the interests of the workers.

The importance to a union of many of the issues insulated from bargaining by the various "management rights" was amply illustrated at trial. The witnesses showed that a union deprived of the right to negotiate over subjects defined as management rights would offer few attractions to a worker. Mr. Lubin, an attorney with extensive experience in labor-management relations, commented upon the effect of exclusion from the negotiating table of crew size and make-up and assignment of work:

> Well, it would—the employees would become more questioning of the benefits they can obtain by joining a union: what good can you do for me; you can't talk about how many people do how much; they can still force me to do all this kind of extra work; you can't do anything about it. They become more and more apathetic, more and more apprehensive, . . . and they would tend not to associate with fellow employees who might want to belong to the union. (A. 433-34.)

Faced with the prohibition on bargaining over discharge, Mr. Chavez noted the effect:

> It would be very difficult to demonstrate to the workers the use and need of a union. We couldn't do anything about a worker being discharged. . . . I have grave doubts that the workers would be interested in a union. (A. 391.)

The Act even incorporates substantial limitations upon the right of unions to bargain regarding the wages to be paid employees. Section 1385 (B)(5)(a) makes bargaining over the payment or delivery of "any money or thing of value for services which are not performed or are not to be performed" illegal.[232] This radical rewriting of the NLRA provision after which Section 1385(B)(5)(a) was patterned prohibits the discussions of severance pay, vacations, holidays, sick-leave, paid rest periods, reporting or stand-by time or travel time, to name a few. Although the AERB has attempted to rehabilitate this section by regulation,[233] such issues as severance pay, paid rest periods and witness and jury duty pay are totally excluded from the bargaining table.

The Act thus impinges upon a union's ability to negotiate over matters fundamentally intertwined with basic worker concerns: job security, seniority, and pay, to name

[232] § 1358(B)(5)(a) is patterned after § 8(b)(6) of the NLRA (29 U.S.C. § 158(b)(6)) which makes it an unfair labor practice for a labor organization or its agents ". . . to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, *in the nature of an exaction*, for services which are not performed or not to be performed." (Emphasis added.) The language of the Act deletes the emphasized portion of § 8(b)(6): "in the nature of an exaction." The consequence of this deletion is wide-ranging. This language was included by Congress in the NLRA to make clear that only featherbedding demands were to be illegal; such issues as rest periods, jury pay, severance pay, etc. were not to be included. For the background and purpose of § 8(b)(6), *see, American Newspaper Publishers Assn. v. N.L.R.B.*, 345 U.S. 100, 111, n. 10 (1953); *American Newspaper Publishers Assn.*, 86 NLRB 951, 25 LRRM 1002 (1949); 93 Cong. Rec. 6603, 2 *Leg. Hist. of the LMRA* 1545 [debate between Senators Taft and Pepper]; 93 Cong. Rec. 1001-02, 2 *Leg. Hist. of the LMRA* 1623-24.

[233] Reg. R4-207(A) provides as follows:

> Section 23-1385(B)(5)(A) [sic] of the Act shall not include as an unfair labor practice the payment of money or other things of value for show-up time, holiday pay, or vacation pay.



a few. And, although employer-union negotiations may proceed on permissible subjects, the AERB stands with little power to review an employer's conduct to determine whether he is negotiating in good faith as required by Section 1385(D). The Board cannot look to the refusal or failure of the employer to agree to a proposal or to the making of a concession as a basis upon which to find "bad faith". Yet, the NLRB recognizes the unwillingness of an employer to make concessions as representing an important indication of "bad faith" bargaining, for, as Justice Frankfurter, concurring and dissenting in *N.L.R.B. v. Truitt Manufacturing Co.*, 351 U.S. 149, 154 (1956), noted, "[good faith] is inconsistent with a predetermined resolve not to budge from an initial position." The AERB is statutorily precluded from considering such a resolve in its determination of whether an employer is negotiating in "good faith". The Board could not look at an employer's refusal to accept a union proposal, even if the union suggested a previous employer proposal, as an indication of "bad faith" bargaining. *Compare, Texas Coca-Cola Bottling Company*, 146 NLRB 420, 429, 55 LRRM 1326 (1964).

The AERA's substantial restrictions upon the scope of collective bargaining frustrate a primary purpose for which workers join together in unions: The negotiation of an agreement regarding wages, hours and working conditions. This effect causes a significant impingement upon the right to associate, for these restrictions lessen the effectiveness of a union and its desirability to workers. Without the right to bargain about key issues relating to wages and worker security, an association for bettering the terms and conditions of employment loses all attractiveness. Although these

restrictions upon collective bargaining may only indirectly affect farmworkers' associational interests, this Court has recognized that the right of association constitutionally protects against the indirect, as well as direct, interference with associational activities. *E.g., Healy v. James, supra,* 408 U.S. at 183; *N.A.A.C.P. v. Alabama, supra,* 357 U.S. at 461.

## VIII.

## ABSOLUTE DENIAL TO THE AERB OF DISCRETION TO REQUIRE THAT AN AGRICULTURAL EMPLOYER FURNISH MATERIALS, INFORMATION, TIME OR FACILITIES TO ENABLE A LABOR UNION TO COMMUNICATE WITH FARMWORKERS IS UNCONSTITUTIONAL.

Section 1385(C) mandates, *inter alia,* that "no employer shall be required to furnish . . . materials, information, time, or facilities to enable . . . [a] labor organization . . . to communicate with employees of the employer . . . ." In the agricultural setting, where growers often own the fields in which farmworkers toil, the labor camps where they live, and the buses which transport them from one to the other, this rule closes off all channels of communication between a union and farmworkers.[234] A restriction of such

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> [M]any farmworkers are migrants; they arrive in town in time for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in. Obviously home visits, mailings, or telephone calls are impossible in such circumstances . . . . [E]ven those farmworkers who are relatively sedentary often live in widely spread settlements, thus making personal contact at home impractical because it is both time-consuming and expensive.
>
> Nor is pamphleting or personal contact on public property adjacent to the employer's premises a reasonable alternative in the present context, on several grounds. To begin with, many ranches have no such public areas at all: . . . the cultivated fields begin at the property line, and across that line is either an open highway or the fields of another grower. Secondly, the typical industrial scene of a steady stream of workers walking through the factory gates to and from the company parking lot or nearby public transportation rarely if ever occurs in a rural setting. Instead, the evidence showed that labor contractors frequently transport farmworkers by private bus from camp to field or from ranch to ranch, driving directly onto the premises before unloading; in such circumstances, pamphleting or personal contact is again impossible. Thirdly, . . . a significant number of farmworkers read and understand only Spanish, Filipino, or other languages from India or the Middle East. It is evident that efforts to communicate with such persons in the local media are futile. Finally it was also shown that many farm workers are illiterate, unable to read even in one of the foregoing languages; in such circumstances, of course, printed messages in handbills, mailings, or local newspapers are equally incomprehensible. (*A.L.R.B. v. Superior Court of Tulare County,* 16 Cal. 3d 392, 415-16, 546 P. 2d 687, 128 Cal.Rptr. 183 (1976), *appeal dismissed,* 429 U.S. 802 (1976).)

See also, *Migrant and Seasonal Farmworker Powerlessness, Hearings Before the Subcomm. on Migratory Labor of the Sen. Comm. on Labor and Public Welfare,* 91st Cong., 1st & 2nd Sess. (1970); Parts A & B; "The Unionization of Farm Workers: Background and Alternative Federal Approaches", Burton, *Congressional Research Service* (June 6, 1977) Multilith No. 77-88 E, pp. 3-15.

Based on testimony and stipulations, the District Court found:

> Therefore, the work is intermittent and employees often must leave an area immediately after a harvest to find other employment. Many employees do not return to the same employer in a following year so that each year there is a substantial change in the work force. (A. 472.)

Furthermore, the Court considered testimony and also took judicial notice of living and working patterns in agriculture, facts commonly known in every major State of the migrant stream, and found that:

> Much of the work of reaching agricultural employees must be done on the employer's property, since most agricultural employees are migrants with no permanent residence in the area and live in labor camps on the employer's premises. (A. 474.)

Judicial notice of these facts was proper and supports the lower court's conclusion that § 1385(C) is unconstitutional as applied in agriculture. *See, e.g., Contractors Ass'n of Eastern Pa. v. Sec'y of Labor,* 311 F.Supp. 1002 (E.D. Pa, 1970) [conditions in the building industry are common knowledge and may be judicially noticed];



breadth impermissibly infringes precious First Amendment rights.

While insulating *ALL* property, both fields and camps, from union access, Section 1385(C) also prohibits the AERB from requiring *ANY* "information" or "materials" which might enable a union to communicate with farmworkers. Translated into practical terms, this means that an employer cannot be required to give out post office boxes or home addresses, even for employees who live off company property. The only information which an employer must produce is the names of his employees ten days after direction of an election.[235] While an employer must turn over a list of employee names, he need not provide information which would enable a union to contact those workers, and can keep the union from entering his fields or labor camps to request such information from the workers themselves. Thus, all avenues of access are closed.

The effect of Section 1385(C) is to eliminate effective communication between unions and farmworkers. The right to *speak* out on labor issues (*Thornhill v. Alabama, supra,* 310 U.S. 88), and the right to *hear* such speech (*Virginia St. Bd. of Pharmacy v. Virginia Citizens' Council, supra,* 425 U.S. 748), are both decimated to impose a sanctuary of private property rights. This the State may not constitutionally do. *Marsh v. Alabama,* 326 U.S. 501 (1946).

In the labor context, this Court has recognized that in order to exercise the right to organize granted by the NLRA, unions must be able to communicate effectively with

*Ponce v. Housing Auth. of Tulare County,* 389 F.Supp. 635 (E.D. Cal., 1975) [court may take judicial notice of fact that farmworkers receive substantially less income than average American family]; *Crawford v. Davis,* 249 F.Supp. 943 (E.D. Pa., 1966), *cert. den.* 383 U.S. 921 [inherently mobile nature of military life may be judicially noticed].

[235] § 1389(I). See fn. 16, *infra.*



workers about the advantages of unionization. *N.L.R.B. v. Babcock & Wilcox,* 351 U.S. 105 (1956). In fact, "when the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Id.,* 351 U.S. at 112.[236]

These principles have been applied with particular immediacy to agriculture where employers often own both the work-place and the living quarters. "A labor housing facility is not the equivalent of a prison isolation block, impervious to visitation," (*U.F.W. v. Superior Court*), *supra,* 14 Cal.3d 902, 910, 122 Cal.Rptr. 877, 537 P.2d 1237), and residents do not lose their basic right to receive information, including facts about labor organizing, merely because the landlord is also the employer.[237] Applying the rationale of *Marsh v. Alabama, supra,* 356 U.S. 501, to labor

[236] Although Appellants appear to embrace *Babcock,* they refuse to recognize how completely the AERA ignores the very foundations of *Babcock.* While ostensibly granting farmworkers the right to organize, the AERA renders that right nugatory by eliminating all possibility for effective communication between unions and farmworkers.

[237]

> "To the average person, it is inconceivable that his landlord would have the right to determine who shall, and who shall not be able to visit his home. But in the name of property rights, some owners of migrant labor camps presume to bar all outsiders whom they, in their sole discretion, determine should [not] be allowed to see the residents of the camp. In this way, they keep out not only just peddlers, but union organizers, priests, and ministers, poverty program workers, lawyers, and so called do gooders, who they think might in some way interfere with the docility of their captive work force." (*Subcomm. Report of the Comm. on Labor and Public Welfare on Migratory Labor, The Migratory Farm Labor Problem In the U.S.,* 90th Cong., 2d Sess., as extended, p. 49 (1969).)

camps, leads to the conclusion that protection of constitutional free speech requires, at a minimum, some access to labor camp residences.

The *Marsh* decision, recently reaffirmed in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976), rests upon the premise that where private property functions as a residential community, the residents' right to speak about or receive information on religious, political, or economic issues is protected by the First Amendment, despite private title. Labor camps are no less residential than Chickasaw, Alabama, the company town in *Marsh*. That a camp owner may or may not provide the security protection or sewage disposal available in Chickasaw is, therefore, immaterial to the application of First Amendment protections. *Peterson v. Talisman Sugar Co.*, 478 F.2d 73 (5th Cir., 1973); *U.F.W. v. Mel Finerman*, 364 F.Supp. 326 (D. Colo., 1973); *Franceschina v. Morgan*, 346 F.Supp. 833 (S.D. Ind., 1972); *Folgueras v. Hassle*, 331 F.Supp. 615 (W.D. Mich., 1971). A denial of camp residents' right to receive information, such as that found in Section 1385(C), is just as complete and constitutionally repugnant as in the company town in *Marsh*.

Implicitly conceding that a complete denial of access to property of an agricultural employer would be constitutionally impermissible, Appellants assert that Section 1385 (C) "does not mean that an employer in all cases may deny access to his property."[238] However, the statutory language clearly eliminates any power of the AERB to require access.[239]

[238]Brief for the Appellants, at 41.

[239]Appellants argue that "facilities" does not include real property, implying the AERB could require access to real property but not to buildings. Even assuming the validity of this argument, the AERB is prohibited from demanding the "time" necessary to allow a union to take access to such property, indirectly but effectively closing off that channel of communication too. Furthermore, Arizona trespass laws preclude entrance onto private property by union supporters or organizers. Whether or not "facilities" includes real property, employers can and do use state trespass laws to prevent union access to real property.



Taking the opposite approach and citing *N.L.R.B. v. Babcock & Wilcox, supra*, 351 U.S. 105, Appellants argue that access to an employer's property may be completely denied so long as there are other channels of communication open. Brief for the Appellants, pp. 69-72. The argument does not go far enough—for the critical inquiry remains: *where no reasonable alternatives exist, can the State prevent its labor board from ordering access to an employer's property. Babcock* held that where no reasonable alternatives for communication between unions and workers exist, private property must give way to free speech, and the proper accommodation between these two interests rests with the labor board. *Id.*, 351 U.S. at 112.

Denial to the AERB of discretion to require access to an agricultural employer's property where necessary in order to preserve First Amendment rights as well as the right to organize under the AERA, and limitation upon the information obtainable from employers which might enable a union to communicate with farmworkers impose overbroad and intolerable restrictions on Free Speech in the agricultural labor context.

## IX.

## THE AERA'S IMPOSITION OF WIDESPREAD RESTRAINTS UPON THE EXERCISE OF FUNDAMENTAL RIGHTS BY SOME FARMWORKERS BUT NOT OTHERS WHO ARE SIMILARLY SITUATED, THROUGH A RELATIONSHIP TO THE STATED OBJECTIVES OF THE STATUTE, VIOLATES THE EQUAL PROTECTION CLAUSE.

As is discussed in other parts of this Brief, numerous provisions of the AERA place restrictions on strikes, picketing, handbilling, and oral conversations within the ambit of First Amendment protections.[240] These broad restrictions apply to some farm workers and not to others, based upon distinctions which bear no relation to any legitimate state interest. For example, under Section 1382(1) of the AERA, employees engaged in hauling and stitching operations, and employees engaged in packing operations outside of the field are not included in the definition of "agricultural employee".[241] These distinctions are not based on any legitimate objectives of the law, and for this reason deny to farm workers who pick and pack in the field equal protection of the law.

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[240] *See*, Parts IV, V, and VI, *supra*.

[241] "[T]he function of 'stitching' referred to in § 1382(1)(g), is the assembling of cartons in which produce is to be packed. This function, which occurs during the harvest, generally occurs on the back of a truck or wagon (in the field) and sometimes occurs at a location or facility away from the field and away from the farm. The function of 'hauling' referred to in § 1382(1)(g) is the transporting of produce after it has been harvested. The function of packing agricultural produce may occur in the field or in a shed or facility on or off the farm." (*Stipulation*, in Pre-Trial Order, A. 64.)



The avowed purpose of the restrictions imposed by the AERA is to ensure "the uninterrupted production, packing, processing, transporting, and marketing of agricultural products." Section 1381. This purpose provides no basis for distinguishing between pickers and workers who pack in the field, on the one hand, and haulers, stitchers, and packing shed workers on the other, in terms of the regulation of concerted activity in agriculture. Undisputed testimony established that a strike by haulers and stitchers, or one by packing shed workers, can have the effect of stopping all work in the fields.[242] Yet, the Act pointedly excludes these workers from its reach.

In argument to the court below, the only state interest which Arizona has raised in support of these classifications is the suggestion that the exempted workers are covered by the National Labor Relations Act so that coverage under the AERA is preempted. Quite simply, the law is well established that many of these employees are not covered by the NLRA. See, e.g., *Bodine Produce Company*, 147 NLRB 832, 56 LRRB 1276 (1964); *D'Arrigo Bros. of California*, 171 NLRB 22, 68 LRRM 1013 (1968); *Dofflemeyer Bros. v. N.L.R.B.*, 206 F.2d 813 (9th Cir., 1953). The State's erroneous argument is certainly not a compelling state interest for the classifications the Act incorporates.[243]

A distinction drawn by a statute which affects fundamental rights is invalid unless supported by a *compelling*

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[242] A. 391-96.

[243] The Arizona legislature could easily have provided for the definition of "employee" under the Act to stop where NLRA jurisdiction begins. The California Agricultural Labor Relations Act defines "agricultural employee" in this manner. *See*, California Labor Code, § 1140.4(b).

state interest. *Shapiro v. Thompson, supra,* 394 U.S. at 634. The rights of expression and association guaranteed by the First Amendment are fundamental rights for equal protection purposes. *Williams v. Rhodes,* 393 U.S. 23 (1968); *Police Dept. v. Mosely, supra,* 408 U.S. 92; *San Antonio School District v. Rodriguez,* 411 U.S. 1, 34-35 (1973).

In its selective application to a portion of the farm labor population, the AERA compares to ordinances invalidated in *Police Dept. v. Mosley, supra,* 408 U.S. 92 and *Grayned v. City of Rockford,* 408 U.S. 104 (1972). The ordinances forbade picketing in certain locations, but specifically excepted labor picketing. This Court invalidated the ordinances, without reaching the issue of whether the restrictions imposed on picketing in themselves exceeded First Amendment requirements, on the grounds that the ordinances discriminated among pickets. Similarly, with no compelling interest the AERA discriminates among those allowed to engage in picketing and in a plethora of other forms of free expression.

Indeed, the selective application of the AERA to different categories of farm workers fails even the "rational basis" test. Under the less stringent equal protection test applicable where no fundamental interest or suspect classification is involved, the relationship between the distinctions drawn by the legislation and its objectives are examined for their rationality. *Eisenstadt v. Baird,* 405 U.S. 438, 447-48 (1972); *United States Department of Agriculture v. Moreno,* 413 U.S. 528, 534-3 (1973).

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Reed v. Reed,* 400 U.S. 71, 76 (1972).)



The distinctions made in the application of the AERA to farm workers fail this test, since the selective regulation of union activities bears no relation to the Act's purposes.

By broadly restricting free expression and associational rights of some farm workers, and placing no restrictions on other farm workers, for no compelling state interest, the AERA denies equal protection of the laws to those workers within its coverage.

## X.

## THE AERA IS AN OVERBROAD AND VAGUE CRIMINAL STATUTE SUSCEPTIBLE OF SWEEPING AND IMPROPER APPLICATION WHICH FAILS TO ADEQUATELY DEFINE UNLAWFUL CONDUCT.

Section 1392 of the AERA imposes criminal penalties upon any person who violates any provision of the Act.[244] The District Court held that this Section transforms the entire Act into a criminal statute which, given the AERA's extensive prohibition and restriction of speech activities, creates an overbroad criminal regulation.[245] This conclusion correctly follows from this Court's long line of deci-

[244] § 1392:
> Any person who wilfully resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, *or who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than one year, or both.* [Emphasis added.]

[245] A. 464-65.

sions invalidating imprecise or sweeping criminal laws that intrude into the area of fundamental freedoms.

A principle of constitutional law for which this Court has demonstrated constant vigilance is that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *In Re Primus,* ..... U.S. ....., 98 S.Ct. 1893, 1905 (1978); *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967); *United States v. Robel, supra,* 389 U.S. at 270. Even in cases in which a legitimate governmental interest exists "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker, supra,* 364 U.S. at 488; *Elfbrandt v. Russel,* 384 U.S. 11, 18 (1966).

The danger with overbroad criminal statutes is that they gather within their sweep not only activity which the State may legitimately proscribe but also activity which it clearly cannot. As the Court said in *N.A.A.C.P. v. Button, supra:*

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, *but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute, susceptible of sweeping and improper application.* (371 U.S. at 432-33; Emphasis added.)

This Court recently reaffirmed the *Button* holding in *In Re Primus, supra,* where it held that while the State of South Carolina enjoyed a legitimate and broad power to regulate the practice of professions it could not do so



through broad prophylactic rules which improperly impose upon rights of expression and association. *Id.,* ..... U.S. ....., 98 S.Ct. at 1905-06 (1978). *See, Aptheker v. Secretary of State,* 378 U.S. 500, 514 (1964); *U.S. v. Robel, supra,* 389 U.S. at 265-66 (1967).

The AERA both ignores and fails this standard. Many provisions broadly restrict farmworkers' exercise of speech and associational rights, reflecting a rampant insensitivity to those rights and a lack of necessary effort to "regulate in this area only with narrow specificity." *Button, supra,* 371 U.S. at 433, quoted with approval in *In Re Primus, supra,* ..... U.S. ....., 98 S.Ct. at 1905.

The Act's restrictions suppress too broadly expressive conduct in the context of a labor dispute. *Thornhill v. Alabama, supra,* 310 U.S. at 102-03. Thus, it is made a crime subject to a year in jail and a $5,000 fine for a clergyman or housewife acting on behalf of the Union to entreat a store manager to discontinue selling agricultural produce, [246] or for a farmworker to make an inaccurate, deceptive, or untruthful statement while trying to persuade a consumer not to purchase that same produce.[247] Also subject to these penalties is the negotiator who bargains vigorously about many topics of vital concern to farmworkers[248] or the farm worker who continues to carry on informational picketing at a ranch after the employer has filed a petition for an election.[249] There are countless such "crimes" created by this section of the AERA as the Act

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[246] § 1385(B)(7).
[247] § 1385 (B)(8).
[248] § 1384; § 1385(B)(11).
[249] § 1385(B)(12)(c).

repeatedly imposes restraints upon widely recognized and accepted union activities.

This Court has recognized that statutes which indiscriminately encompass both activities protected and not protected under the First Amendment are inherently vague. *See, Shelton v. Tucker, supra,* 364 U.S. at 492, Frankfurter, dissenting; *Hynes v. Mayor and Council of Borough of Oradell,* 425 U.S. 610, 621-22 (1976). Such indefinite standards of guilt where First Amendment interests are involved must fall. As the District Court below noted:

> Considering the enormous variety of activities covered by the Act, and the fact that . . . many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning. Conduct can only be prohibited and punished by certain, clear statutes and such precision is necessary so that "the ordinary person can know how to avoid unlawful conduct." U.S. v. Sullivan, 332 U.S. 689, 68 S.Ct. 331, 92 L. Ed. 297 (1948). Even closer scrutiny is warranted where the regulation covers freedom of speech. Ashton v. Kentucky, 385 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966). (A. 464-65.)

The State's suggestion that despite the overbreadth of the Act, farmworkers should await a case-by-case application in hopes that state courts might someday narrow the provisions to reach only legitimately proscribable conduct misconstrues the Constitution. This Court has repeatedly rejected such a treatment of overbroad criminal statutes.

> If there is an internal tension between proscription and protection in the statute, we cannot assume that in its subsequent enforcement, ambiguities will be resolved



> in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. *(N.A.A.C.P. v. Button, supra,* 371 U.S. at 438.)

*See, Hynes v. Mayor and Council of Borough of Oradell, supra,* 425 U.S. 610; *Aptheker v. Sec'y State, supra,* 378 U.S. at 516.

The State's only attempt to rebut the District Court's holding that the AERA is an overbroad and vague criminal statute is to claim "[s]ince the criminal provision has never been applied it is impossible to know what will be considered a 'violation.' "[250] The argument is both erroneous and revealing: erroneous because, as the District Court recognized, parties against whom a criminal statute is intended to operate need not await actual prosecution to challenge the statute (*Doe v. Bolton, supra,* 410 U.S. 179; *Steffel v. Thompson, supra,* 415 U.S. 452); revealing because this Court long ago established that it is the minimal requirement of a criminal statute that it enable "the ordinary person [to] know how to avoid unlawful conduct" (*U.S. v. Sullivan,* 332 U.S. 689, 693 (1948)), and that it cannot leave men of common intelligence guessing as to its meaning and differing as to its application. *Connelly v. General Construction Co.,* 269 U.S. 385, 391 (1926). A criminal statute that makes it impossible to know what is a violation obviously violates Due Process. *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961).

The District Court had no difficulty in determining the obvious overbreadth of the AERA created by Section 1392.

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[250] Brief for the Appellants, p. 37.

The State's hoped-for narrowing in future prosecutions of the Union and farmworkers is not the remedy established by this Court for parties like the Appellees who are subject to these penalties. This is especially so when fundamental First Amendment freedoms are suppressed. *See, Ashton v. Kentucky,* 384 U.S. 195 (1966); *Baggett v. Bullitt, supra,* 377 U.S. 360.

## CONCLUSION

Appellees respectfully request this Court to affirm the judgment of the three-judge District Court based on the arguments presented in this brief.

Respectfully submitted,

JEROME COHEN
JAMES RUTKOWSKI
TOM DALZELL
ELLEN GREENSTONE
MICHAEL HEUMANN
LINTON JOAQUIN
GEORGE C. LAZAR
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# Appendices

Rule 65. Injunctions

65(a) Preliminary injunction; notice

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of hearing with trial on merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

Amended July 1, 1966, effective on and after midnight October 31, 1966.

65(b) Dissolution of preliminary injunction prior to final hearing prohibited; exception in case of verified answer. The defendant in an injunction proceeding may answer as in other civil actions but the preliminary injunction shall not be dissolved before final hearing because of a denial of the material allegations of the complaint unless the answer denying the allegations is verified.

65(c) Motion to dissolve or modify. Motions to dissolve or modify a preliminary injunction without determining

the merits of the action may be heard after an answer is filed, upon notice to the opposite party. If, upon hearing the motion, it appears that there is not sufficient ground for the injunction, it shall be dissolved, or if it appears that the injunction is too broad, it shall be modified.

65(d) Temporary restraining order: notice: hearing: duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice or the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters



of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Amended July 1, 1966, effective on and after midnight Oct. 31, 1966.

65(e) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State or of an officer or agency thereof.

The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

Amended July 1, 1966, effective on and after midnight Oct. 31, 1966.

65(f). Deleted. Effective Nov. 1, 1967.

65(g) Security on injunction restraining collection of money; injunction made permanent

1. Upon dissolution of a preliminary injunction or temporary restraining order restraining the collection of

money, if the action is continued over for trial, the court shall require the defendant to give security to be approved by the court, and payable to the plaintiff in the amount previously enjoined and such additional amount as the court requires, and conditioned upon refunding to the plaintiff the amount of money, interest and costs which may be collected by him in the action in the event a permanent injunction is ordered on final hearing.

2. If a permanent injunction is ordered on final hearing, the court shall, on motion of the plaintiff, enter judgment against the principal and surety giving the security for the amount shown to have been collected and to which the plaintiff appears entitled.

65(h) Form and scope of injunction or restraining order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance and shall be specific in terms. It shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained, and it is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

65(i) Writs of injunction; where returnable; several parties. Writs of injunction granted to stay proceedings in an action, or to stay execution of a judgment, shall be returnable to and tried in the court where the action is pending or the judgment was rendered.

65(j) Disobedience of injunction as contempt; order to show cause; warrant; attachment; punishment



1. Disobedience of an injunction may be punished by the court as a contempt.

2. When a party in whose favor an injunction has been issued files an affidavit that the party against whom the injunction was issued is guilty of disobeying the injunction and describes the acts constituting such disobedience, the court may order the person so charged to show cause at the time and place the court directs why such disobedient party should not be adjudged in contempt of the court which issued the injunction.

3. The order, with a copy of the affidavit, shall be served upon the person charged with the contempt within sufficient time to enable him to prepare and make return to the order.

4. If such person fails or refuses to make return to the order to show cause a warrant of arrest may issue directing the sheriff or any constable of the county where the alleged contemnor resides or may be found, to arrest him and bring him before the court at a time and place directed by the court, and he may be required to give bail for his attendance at the trial and his submission to the final judgment of the court.

5. If the alleged contemnor is a corporation, an attachment for sequestration of the property of the corporation may be issued upon refusal or failure to appear.

6. Upon the appearance of the alleged contemnor, or at the trial of the issue, the court shall hear the evidence, and if the person enjoined has disobeyed the injunction he may be committed to jail until he purges himself of the contempt as may be directed by the court or until he is discharged by law.

## Appendix "B"

§ 23-1301.

1. "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment.

## Appendix "C"

§ 23-1321. Definitions

In this article, unless the context otherwise requires:

1. "Labor organization" means an organization of any kind, or an agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment. For the purpose of this article the word "employee" or "employees" does not include persons having supervisory authority, professional or confidential employees, guards or persons employed in personnel departments.

2. "Person" includes a natural person, a corporation, association, company, firm or labor organization.

3. "Secondary boycott" means:

(a) A combination or conspiracy by two or more persons, by a strike, threat to strike, picketing, threat to picket, violence, threat of violence, or by concerted refusal or threat of concerted refusal, to process, install, service, handle, transport or otherwise deal with specified articles, materials or services, to force or require a person to cease or partially to cease processing, installing, servicing, selling, handling or transporting the products of or selling to or otherwise dealing with any other person for the purpose of forcing or requiring such other person to recognize, bargain with or comply with the demands of a labor organization, or for the reason that such other person has in his employ persons who are not members of a labor organization or is not himself a member of a labor organization, or

for the reason that such other person uses goods, materials or services considered objectionable by a labor organization.

(b) An act, combination or agreement which directly or indirectly causes, induces or compels another to strike, threaten to strike, picket, threaten to picket, commit violence, threaten to commit violence, refuse to or threaten to refuse to process, install, service, handle, transport or otherwise deal with specified articles, materials or services, to force or require a person to cease or partially to cease processing, installing, servicing, selling, handling or transporting the products of, or selling to or otherwise dealing with any other person for the purpose of forcing or requiring such other person to recognize, bargain with or comply with the demands of a labor organization, or for the reason that such other person has in his employ persons who are not members of a labor organization, or is not himself a member of a labor organization, or for the reason that such other person uses goods, materials or services considered objectionable by a labor organization.

## Appendix "D"

In the Superior Court of the State of Arizona
in and for the County of Pima

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|---|---|
| The Agricultural Employment Relations Board,<br>Plaintiff,<br>vs.<br>United Farm Workers of America, AFL-CIO, John and Jane Does, 1 thru 100,<br>Defendants. | No. 153789<br>Temporary Restraining Order |

The Court having read the verified Application for Temporary Restraining Order, and it appearing to the satisfaction of the Court that this is a proper case for granting a Temporary Restraining Order,

IT IS ORDERED that the Defendant, United Farm Workers of America, its officers, agents, servants, employees and representatives and all persons in active concert or participation with them are hereby until further order of this Court, restrained and enjoined from:

A. Conducting Secondary Boycotts as defined in A.R.S. 23-1385 (B)(6) and A.R.S. 23-1321 at Roy's Arizona Pharmacy, 647 S. 6th, Tucson, Arizona; Pueblo Liquor Store, 201 North Park, Tucson, Arizona; Fritz's Liquors, 1814 East 36th St., Tucson, Arizona; Market Spot, 937 E. Speedway, Tucson, Arizona; and Super City Department Stores, 505 E. 17th Street, Tucson, Arizona.

B. Attempting to induce, encourage, restrain, coerce, or otherwise interfere with executives or management of the aforementioned stores to make management decisions not to handle, sell or distribute Gallo Brand products in violation of A.R.S. 23-1385(B)(7).

C. Conducting picketing activities which consist of more than five (5) persons at one time at any one of the aforementioned stores.

D. Conducting picketing activities on the privately owned property of any one of the aforementioned stores, or which interferes, prohibits or otherwise obstructs the ingress and egress of the privately owned property of any of the aforementioned stores.

E. Conducting picketing activities at any one of the aforementioned stores which interferes, prohibits, obstructs, or otherwise violates the rights of any individuals who may either pass or enter the privately owned property of the aforementioned stores.

DONE IN OPEN COURT this 20th day of March, 1975.

Norman S. Fenton
Judge of the Superior Court

STATE OF ARIZONA
COUNTY OF PIMA } ss.

The foregoing instrument is a full, true, and correct copy of the original on file in this office.
Book 1472 Page 355

Attested Dec. 21, 1978
NORMA M. FELIX, Clerk

/s/ By B. J. Davis Deputy

Since this document is not a part of the trial record, a certified copy has been attached to the brief stamped "original".

## Appendix "E"

State of Arizona

Before the Agricultural Employment Relations Board

| | |
|---|---|
| The Agricultural Employment Relations Board,<br>Petitioner,<br>vs.<br>Maricopa County Organizing Project, an Arizona corporation, and the United Farm Workers of America (AFL-CIO),<br>Respondents. | Cases Nos. C10-317, C10-318, C10-319, C10-320, C10-321, C10-322, C10-323, C10-324, Consolidated No. C10-287 Plaintiff's Second Amended Complaint and Notice of Hearing |

It having been charged in Cases No. C10-317, C10-318, C10-319, C10-320, C10-321, C10-322, C10-323, C10-324, consolidated into Case No. C10-287, by charging parties named in Paragraph 1 of Count I below, that Maricopa County Organizing Project (herein, M-COP), its officers, agents, servants, employees and representatives and all persons in active concert or participation with M-COP, has engaged in and is engaging in unfair labor practices as set forth and defined in the Agricultural Employment Relations Act, A.R.S. § 23-1381 through 23-1395 (herein called The Act) and,

The said charging parties, having additionally filed amended charges bearing Numbers C10-317A, C10-318A,

C10-319A, C10-320A, C10-321A, C10-322A, C10-323A, C10-324A, all of which have been consolidated into Case No. C10-287, that United Farm Workers of America, AFL-CIO (herein, the UFW), its officers, agents, servants, employees and representatives and all persons in active concert or participation with the UFW has engaged in and is engaging in unfair labor practices as set forth and defined in the Agricultural Employment Relations Act, A.R.S. § 23-1381 through 23-1395 (herein called The Act) and,

Bodine Produce Co., having also filed a charge, bearing No. C12-325, consolidated into Case No. C10-287, that said United Farm Workers of America, AFL-CIO, its officers, agents, servants, employees and representatives and all persons in active concert or participation with it has engaged in and is engaging in unfair labor practices as set forth and defined in the Agricultural Employment Relations Act, A.R.S. § 23-1381 through 23-1395 (herein called the Act), and

The undersigned having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, issues, pursuant to The Act and Section 4-240 of the Agricultural Employment Relations Board's (herein called the Board) Rules and Regulations, the following amended complaint and alleges as follows:

COUNT I

1. The charges in Consolidated Case No. C10-287 were filed by the charging parties, EverKrisp Vegetables, Inc., Tanita Farms, Inc., B & T Farms, Phoenix Vegetable Distributors, Jack Okabayashi Farms, George Matsumori, Davis Packing Co. and Triple T Farms, Inc. on October 29, 1977, and served upon M-COP on October 31, 1977.



2. M-COP is, and has been at al times material herein, a labor organization as defined in A.R.S. § 23-1382(7), 23-1301 and 23-1321.

3. At all times material herein, Guadalupe Sanchez, Jesus Romo, Michael Carey, Jose Ojeda, Daniel Morales and Harriet Cunningham, and Jane and John Does 1-500 have been agents of M-COP and acted on behalf of M-COP.

4. The charging parties as listed above are and have been at all times material herein agricultural employers as defined in A.R.S. § 23-1382(2).

5. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has restrained, coerced, intimidated and threatened, including but not limited to Hermaina Delgado and Fernando Alvarez in the exercise of their rights as provided by A.R.S. § 23-1381, *et seq.,* more specifically in pertinent part, A.R.S. § 23-1383 A and B.

6. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has threatened reprisal against the persons referred to in Paragraph 5 above, for the exercise of their rights as provided by A.R.S. § 23-1381, et seq., more specifically in pertinent part, A.R.S. § 23-1383 A and B.

7. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has engaged in and caused injury to person and property and other violent conduct with the objective of preventing the preparing for market, trans-

porting, handling, displaying for sale, or selling of any agricultural products.

8. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, has intimidated, restrained and coerced agricultural employers in the exercise of their rights guaranteed to them by A.R.S. § 23-1384.

9. From on or about October 27, 1977, and continuing to date, M-COP through its agents, in an attempt to force field workers to strike, called a strike without first obtaining a majority vote of the employees within the bargaining unit to call a strike by secret ballot.

10. The actions referred to in Paragraph 5 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B1) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

11. The actions referred to in Paragraph 6 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B2) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

12. The actions referred to in Paragraph 7 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B10) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.



13. The actions referred to in Paragraph 8 above constitute an unfair labor practice as defined in A.R.S. § 12-1385(B11) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

14. The actions referred to in Paragraph 9 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B13) of the Act, and subject M-COP to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

15. The actions of M-COP referred to in Paragraphs 5 through 9 above in connection with the operations of the agricultural employers as listed above, are contrary to the public interest of the State of Arizona as provided by A.R.S. § 23-1381 of the Act.

COUNT II

16. Plaintiff realleges all the allegations contained in Count I as if set forth fully herein.

17. The amended charges in Consolidated Case No. C10-287 were filed by EverKrisp Vegetables, Inc., Tanita Farms, Inc., B & T Farms, Phoenix Vegetable Distributors, Jack Okabayashi Farms, George Matsumori, Davis Packing Co. and Triple T Farms, Inc. on December 13, 1977, and served upon the UFW on or about December 15, 1977. Bodine Produce Co. filed its charge against the UFW on or about December 15, 1977.

18. The UFW is, and has been at all times material herein, a labor organization as defined in A.R.S. § 23-1382(7), 23-1301 and 23-1321.

19. At all times material herein, Guadalupe Sanchez, Jesus Romo, Michael Carey, Jose Ojeda and Daniel Morales, and Jane and John Does 1-500 have been agents of UFW and acted on behalf of the UFW.

20. The charging parties as listed above, are and have been at all times material herein, agricultural employers as defined in A.R.S. § 23-1382 (2).

21. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has restrained, coerced, intimidated and threatened, including but not limited to Sean Naramore and Carlos Cabrera in the exercise of their rights as provided by A.R.S. § 23-1381, *et seq.*, more specifically in pertinent part A.R.S. § 23-1383 A and B.

22. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has threatened reprisal against the persons referred to in Paragraph 21 above, for the exercise of their rights as provided by A.R.S. § 23-1381, *et seq.*, more specifically in pertinent part A.R.S. § 23-1383 A and B.

23. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has engaged in and caused injury to person and property and other violent conduct with the objective of preventing the preparing for market, transporting, handling, displaying for sale, or selling of any agricultural products.



24. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, has intimidated, restrained and coerced agricultural employers in the exercise of their rights guaranteed to them by A.R.S. § 23-1384.

25. From on or about December 8, 1977, and continuing to date, the UFW through its agents, in an attempt to force field workers to strike, called a strike without first obtaining a majority vote of the employees within the bargaining unit to call a strike by secret ballot.

26. The actions referred to in Paragraph 21 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B1) of the Act, and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

27. The actions referred to in Paragraph 22 above, constitute an unfair labor practice as defined in A.R.S. § 12-1385 (B2) of the Act, and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

28. The actions referred to in Paragraph 23 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B10) of the Act, and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

29. The actions referred to in Paragraph 24 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B11) of the Act and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act provided by A.R.S. § 23-1390 of the Act.

30. The actions referred to in Paragraph 25 above constitute an unfair labor practice as defined in A.R.S. § 23-1385 (B13) of the Act and subject the UFW to a cease and desist order issued by the Board and such other affirmative action that will effectuate the policies of the Act as provided by A.R.S. § 23-1390 of the Act.

31. The actions of the UFW referred to in Paragraphs 21 through 25 above in connection with the operations of the agricultural employers as listed above, are contrary to the public interest of the State of Arizona as provided by A.R.S. § 23-1381 of the Act.

PLEASE TAKE NOTICE that on the 10th day of January, 1978, at a time and place to be established, a hearing will be conducted before a duly designated Trial Examiner of the Agricultural Employment Relations Board on the allegations set forth herein, at which time and place you will have the right to appear in person or otherwise, and give testimony. Said hearing shall be conducted in accordance with Sections R4-257 through R4-267 of the Rules and Regulations of the Agricultural Employment Relations Board.

YOU ARE FURTHER NOTIFIED that, pursuant to Section R4-242 of the Board's Rules and Regulations, the Respondent shall file with the General Counsel, an original



and two (2) copies of an answer to the foregoing complaint within ten (10) days from the service thereof and that unless it does so, all of the allegations of the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Phoenix, Arizona this 16th day of December, 1977.

William Gibney
General Counsel

*Copies of the foregoing mailed to:*

Maricopa County Organizing Project
c/o Caryl Preusch-Sanchez
Post Office Box 819
El Mirage, Arizona 85335

United Farm Workers
c/o Michael McCrory
Post Office Box 880
El Mirage, Arizona 85335

William Gibney

I hereby certify that the above document is a true and correct copy.

/s/ Maxine Olds
Administrative Secretary
My Commission Expires Apr. 4, 1982

Dated: December 21, 1978

Since this document is not a part of the trial record, a certified copy has been attached to the brief stamped "original".

**APPENDIX "F"**

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

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|---|---|
| THE AGRICULTURAL EMPLOYMENT RELATIONS BOARD,<br>Petitioner,<br><br>vs.<br><br>UNITED FARM WORKERS OF AMERICA, AFL-CIO,<br>Respondent. | NO. C361165<br><br>Temporary Restraining Order Pursuant to A.R.S. § 23-1390K and Order to Show Cause |

Upon reading the Petition and the affidavits thereto filed by Petitioner in this action, and it appearing therefrom to the satisfaction of the Court that pursuant to A.R.S. § 23-1390K this is a proper cause for the issuance of a temporary restraining order and order to show cause; and that great and irreparable injury would result to Petitioner herein, and good cause appearing therefor,

IT IS THEREFORE ORDERED that the above-named Respondent appear before this Court, in Division No. 15 thereof, at 8:00 o'clock a.m., on the 5th day of January, 1978, then and there to show cause, if any, why it and its officers, agents, servants, employees, representatives and members, and all persons in active concert or participation with them, including, but not limited to, Guadalupe San-

chez, Jesus Romo, Michael Carey, Jose Ojedo, Juan Ojedo and Daniel Morales should not be restrained and enjoined during the pendency of this action from doing, directly or indirectly, by any means, method or device whatsoever, any of the following acts:

a. Obstructing or interfering with or attempting to obstruct or interfere with any free use, occupation and enjoyment of property of the charging parties by said charging parties, their agents, employees, customers, guests or invitees;

b. Obstructing in any manner any entrance or exit of the charging parties' premises;

c. Obstructing or interfering with the movement of any vehicle or person entering or leaving or attempting to enter or leave, or approaching or attempting to approach or departing or attempting to depart from the premises of any charging party;

d. Interfering with or obstructing the movement of any vehicle or person on sidewalks, roads, streets and highways abutting, leading to or adjoining the premises of any charging party;

e. Intimidating, threatening, molesting or coercing any of the charging parties or their agents, employees, prospective employees, customers, guests or invitees at any place or time;

f. Threatening or causing bodily harm to charging parties' employees, prospective employees, guests, invitees or any other person having business with the charging parties or the driver or operator of any vehicle attempting to enter, entering, attempting to leave or leaving the premises of any charging party or from



wilfully damaging or threatening to damage any property in or about said premises or on the public roadways near or adjacent thereto;

g. Placing, maintaining or stationing any more than a total of ten pickets or persons on or about any public road or public or private area immediately adjacent to any road which abutts the charging parties' property. For purposes of this order, picketing means standing, walking, sitting or otherwise congregating in any fashion whatsoever, with or without signs, at or near the property of any charging party. No picket or person shall stand, sit, walk or otherwise congregate within fifty (50) feet of any entrance of the property of any charging party.

h. Engaging in any conduct (including making any written or oral statement) which forces, threatens or coerces employees or prospective employees to strike or refrain from working or stop working on premises of the charging parties;

i. Entering upon the charging parties' property, picketing or maintaining or stationing any pickets or other persons on the property of any charging party or marching, standing, sitting, walking, driving or otherwise trespassing on said property;

j. Using any loudspeaker, broadcasting device or sound-amplification equipment within a distance of 150′ from employees of the charging parties or within a distance of 300′ of any dwelling, house or structure where any people dwell or reside, or using such devices or equipment under any circumstances prior to 6:30 A.M. or using more than one loudspeaker, broadcasting or sound-amplification device at any one time on any road or property immediately adjacent to any road abutting the charging parties' property;

k. Intimidating in any manner or threatening with bodily harm or injury or harassing, assaulting, pushing, striking or in any manner physically contacting any person, clothing or vehicle of any of the charging parties' employees, agents, customers, visitors, invitees, suppliers or other persons entitled to enter on their premises;

l. Shouting, yelling, uttering or using any loudspeakers or broadcasting device to utter words of profanity or opprobrium or making derogatory, obscene or abusive remarks or gestures so as to harass, intimidate or threaten or lead to a disturbance or result in any breach of peace.

IT IS ORDERED that, pending the determination of the above Order to Show Cause, or pending the further order of this Court, the Respondent and its officers, agents, servants, employees, representatives and members, and all persons in active concert or participation with them, including, but not limited to, Guadalupe Sanchez, Jesus Romo, Michael Carey, Jose Ojedo, Juan Ojeda and Daniel Morales, are hereby enjoined and restrained from doing directly or indirectly by any means, method or device whatsoever, any of the following acts:

a. Obstructing or interfering with or attempting to obstruct or interfere with any free use, occupation and enjoyment of property of the charging parties by said charging parties, their agents, employees, customers, guests or invitees;

b. Obstructing in any manner any entrance or exit of the charging parties' premises;

c. Obstructing or interfering with the movement of any vehicle or person entering or leaving or attempting to enter or leave, or approaching or attempting to ap-



proach or departing or attempting to depart from the premises of any charging party;

d. Interfering with or obstructing the movement of any vehicle or person on sidewalks, roads, streets and highways abutting, leading to or adjoining the premises of any charging party;

e. Intimidating, threatening, molesting or coercing any of the charging parties or their agents, employees, prospective employees, customers, guests or invitees at any place of time;

f. Threatening or causing bodily harm to charging parties' employees, prospective employees, guests, invitees or any other person having business with the charging parties or the driver or operator of any vehicle attempting to enter, entering, attempting to leave or leaving the premises of any charging party or from wilfully damaging or threatening to damage any property in or about said premises or on the public roadways near or adjacent thereto;

g. Placing, maintaining or stationing any more than a total of ten pickets or persons on or about any public road or public or private area immediately adjacent to any road which abutts the charging parties' property. For purposes of this order, picketing means standing, walking, sitting or otherwise congregating in any fashion whatsoever with or without signs, at or near the property of any charging party. No picket or person shall stand, sit, walk or otherwise congregate within fifty (50) feet of any entrance of the property of any charging party;

h. Engaging in such conduct (including making any written or oral statement) which forces, threatens or coerces employees or prospective employees to

strike or refrain from working or stop working on premises of the charging parties;

i. Entering upon the charging parties' property, picketing or maintaining or stationing any pickets or other persons on the property of any charging party or marching, standing, sitting, walking, driving or otherwise trespassing on said property;

j. Using any loudspeaker, broadcasting device or sound-amplification equipment within a distance of 150′ from employees of the charging parties or within a distance of 300′ of any dwelling, house or structure where any people dwell or reside, or using any devices or equipment under any circumstances prior to 6:30 A.M. or using more than one loudspeaker, broadcasting or sound-amplification device at any one time on any road or property immediately adjacent to any road abutting the charging parties' property;

k. Intimidating in any manner or threatening with bodily harm or injury or harassing, assaulting, pushing, striking or in any manner physically contacting any person, clothing or vehicle of any of the charging parties' employees, agents, customers, visitors, invitees, suppliers or other persons entitled to enter on their premises;

l. Shouting, yelling, uttering or using any loudspeakers or broadcasting device to utter words of profanity or opprobrium or making derogatory, obscene or abusive remarks or gestures so as to harass, intimidate or threaten or lead to a disturbance or result in any breach of peace.

FOR PURPOSE OF THIS ORDER, property or premises of the charging parties means property owned or leased by charging parties or upon which agricultural crops



are being harvested, cultivated, packed or tied by or for the charging parties, to wit: Ever-Krisp Vegetables, Inc., Tanita Farms, Inc., B & T Farms, Phoenix Vegetable Distributors, Jack Okabayashi Farms, George Matsumori, Davis Packing Co., Triple T. Farms, Inc. and Bodine Produce Co.

IT IS FURTHER ORDERED that a copy of the Petition and this Temporary Restraining Order and Order to Show Cause be served on the Respondent herein on or prior to the 30th day of December, 1977.

IT IS FURTHER ORDERED that the Maricopa County Sheriff's Office and any other state or local enforcement agency, shall be and are hereby directed to enforce the terms and provisions of this Order.

DONE IN OPEN COURT this 20th day of December, 1977.

HAROLD G. MARTIN
Judge of the Superior Court

STATE OF ARIZONA,
County of Maricopa, } ss.

I, WILSON D. PALMER, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify that I have compared the foregoing copies with the originals
TEMPORARY RESTRAINING ORDER PURSUANT to A.R.S. S23-1390K AND ORDER TO SHOW CAUSE
Filed Dec. 20, 1977
PETITION FOR TEMPORARY RESTRAINING ORDER PURSUANT TO A.R.S. 23-1390 (K)

Filed Dec. 16, 1977

in the above entitled C361105 and that same are true copies of the originals, and of the whole thereof.

WITNESS my hand and the Seal of said Court, this 21st day of December, 1978.

WILSON D. PALMER, Clerk
By M. Perry,
Deputy Clerk.

Form 43-15A

Since this document is not a part of the trial record, a certified copy has been attached to the brief stamped "original".